

From: [Galst, Carey](#)
To: [Carey Gilbert](#)
Subject: Fwd: Skinny AR is in my reviewed folder
Date: Wednesday, September 5, 2018 8:27:07 PM
Attachments: [20180723_FOIA_and_Skinny_AR_guidance_pg_cjg.docx](#)

I moved the version out of the review folder and it is attached here. I think we were going to clean it up and then have Bridget send out and email to all folks...right? If that is the case we probably need to draft an email for her to send. And then I or you and Eileen can circulate Bridget's email to all our people to make sure everyone gets it that needs it.
Do you remember a different process than what I am recalling?

----- Forwarded message -----

From: **Galst, Carey** <carey_galst@fws.gov>
Date: Wed, Sep 5, 2018 at 8:23 PM
Subject: Re: Skinny AR is in my reviewed folder
To: "Shultz, Gina" <gina_shultz@fws.gov>
Cc: Parks Gilbert <parks_gilbert@fws.gov>, Bridget Fahey <bridget_fahey@fws.gov>

Thanks, Gina! We will clean this up and move to finalize the guidance.

><> ><> ><> ><> ><> ><> ><> ><> ><> ><> ><>

Carey Galst-Cavalcante

Chief, Branch of Listing Policy and Support, Ecological Services
U.S. Fish and Wildlife Service Headquarters
5275 Leesburg Pike MS: ES, Falls Church, VA 22041-3803
phone: 703-358-1954; fax: 703-358-1735
email: Carey_Galst@fws.gov

On Wed, Sep 5, 2018 at 5:13 PM, Shultz, Gina <gina_shultz@fws.gov> wrote:

i think i only had one edit.

Gina Shultz
Deputy Assistant Director, Ecological Services
U.S. Fish and Wildlife Service
MS: ES
[5275 Leesburg Pike](#)
[Falls Church, VA 22041-3803](#)
703-358-1985

From: [Gilbert, Parks](#)
To: [Carey Galst](#)
Cc: [Harke, Eileen](#)
Subject: Re: Skinny AR is in my reviewed folder
Date: Thursday, September 6, 2018 11:13:33 AM
Attachments: [20180906_FOIA_and_Skinny_AR_guidance.docx](#)
[Haugrud_email.pdf](#)
[ENRD Memo - Administrative Record \(October 20, 2017\).pdf](#)
[Foreseeable Harm Memo final Cafaro.pdf](#)

I don't remember what we said we were going to do in terms of sending it out, but having Bridget send it out sounds good. I was just looking through my email to see if she did that previously, as I thought she did and she could just reply to that chain and attach this version, but I can't find that email.

We should make sure that she sends it at least to the ES Chiefs and FWS ES HQ staff. Not sure about ARDs, but maybe. Eileen can send it to FOIA contacts (I would suggest she include Carrie and Larry) and I can send it to my litigation contacts, SAT liaisons, and Joan and Ben.

Here is text for a draft email from Bridget:

"Dear ES HQ Staff [and] ES Chiefs [and ARDs]:

This email transmits guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. Principally in light of the administrative records direction from the Department of Justice last fall, we decided to reassess our approach to FOIA responses, and this guidance reflects and explains that. The attached guidance had input from some HQ and regional staff as well as SOL and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today. If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ.

Thank you -"

Do we need to send out other stuff with it? I've attached everything, including a clean version of the guidance.

Parks Gilbert
Endangered Species Act Litigation Specialist
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
(703) 358-1758
parks_gilbert@fws.gov

On Wed, Sep 5, 2018 at 8:27 PM Galst, Carey <carey_galst@fws.gov> wrote:

I moved the version out of the review folder and it is attached here. I think we were going to clean it up and then have Bridget send out an email to all folks...right? If that is the case we probably need to draft an email for her to send. And then I or you and Eileen can circulate Bridget's email to all our people to make sure everyone gets it that

needs it.

Do you remember a different process than what I am recalling?

----- Forwarded message -----

From: **Galst, Carey** <carey_galst@fws.gov>

Date: Wed, Sep 5, 2018 at 8:23 PM

Subject: Re: Skinny AR is in my reviewed folder

To: "Shultz, Gina" <gina_shultz@fws.gov>

Cc: Parks Gilbert <parks_gilbert@fws.gov>, Bridget Fahey <bridget_fahey@fws.gov>

Thanks, Gina! We will clean this up and move to finalize the guidance.

><> ><> ><> ><> ><> ><> ><> ><> ><> ><> ><>

Carey Galst-Cavalcante

Chief, Branch of Listing Policy and Support, Ecological Services

U.S. Fish and Wildlife Service Headquarters

5275 Leesburg Pike MS: ES, Falls Church, VA 22041-3803

phone: 703-358-1954; fax: 703-358-1735

email: Carey_Galst@fws.gov

On Wed, Sep 5, 2018 at 5:13 PM, Shultz, Gina <gina_shultz@fws.gov> wrote:

i think i only had one edit.

Gina Shultz

Deputy Assistant Director, Ecological Services

U.S. Fish and Wildlife Service

MS: ES

5275 Leesburg Pike

Falls Church, VA 22041-3803

703-358-1985

**Guidance for Applying Deliberative Process Privilege in Processing Ecological Services
FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on
Administrative Records**

Purpose of this Document

To ensure consistent application of the attached Department of Justice Environment and Natural Resources Division's (DOJ) October 20, 2017, administrative record (AR) guidance, this document provides recommendations to Fish and Wildlife Service Ecological Services (FWS) staff for reviewing, redacting, and withholding deliberative information responsive to Freedom of Information Act (FOIA) requests. Specifically, we provide recommendations and considerations for when withholding records as deliberative under FOIA Exemption 5 (5 USC 552(b)(5)) may be appropriate. After identifying documents that should be considered for withholding as deliberative under FOIA Exemption 5, it is incumbent upon FWS personnel engaged in the review process to review all responsive documents, redact them as appropriate, and release any parts of documents that do not qualify for withholding, (i.e., materials that are not deliberative, or would not foreseeably harm the Agency's decision making process if they were released). Where we invoke the deliberative process privilege, FWS must consult with the Department of Interior Solicitor's Office (SOL) to confirm the propriety of invoking FOIA Exemption 5, or other FOIA exemptions.

Note that this document is not intended to be absolute in directing FWS personnel on how to treat all predecisional information in responding to a FOIA request (i.e., it is not suggesting that FWS automatically withhold all such information), nor to replace an appropriate foreseeable harm analysis. Rather, this document is intended to raise awareness of the need to process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could be subsequently included in an AR pursuant to Administrative Procedure Act (APA) litigation involving FWS decisions. While this document will be most useful for Endangered Species Act (ESA) matters, it also applies to FOIAs relating to other laws that are administered by FWS, such as the National Environmental Policy Act, Coastal Barrier Resources Act, Federal Power Act, Bald & Golden Eagle Protection Act, etc., but ESA is the primary focus.

Background

The October 20, 2017, DOJ memorandum clarifies that an AR associated with litigation on an agency decision under the APA should not include deliberative documents. Specifically, the memorandum explains that, "documents reflecting the agency's predecisional deliberative process – generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making." Courts generally review FWS's decisions under APA standards.

Implementing this policy will require a change in the way the FWS compiles ARs for court cases. Previously, it was common practice for the FWS to include deliberative documents in its ARs, even though the agency could have asserted they were deliberative process-privileged, and ARs tended to be voluminous. However, some ARs that have been prepared for programmatic rules or policies and for national consultations have generally not included deliberative documents. For example, ARs on the:

- Policy on Significant Portion of Its Range did not include many substantive emails exchanged during the development of the draft and final policies, nor did it include some drafts of the policy, intra- and inter-agency comments on the policies, and certainly attorney-client privileged materials.
- Section 7 consultation on EPA's Clean Water Act 316(b) rule, which regulates how cooling water intake structures at plants are to operate to avoid harming listed species, we withheld and listed in a privilege log draft biological opinions and reasonable and prudent alternatives, emails containing inter- and intra-agency comments on the drafts, and briefing papers.

Recently (late 2017-early 2018), DOJ has also required that we prepare more limited ARs for non-programmatic ESA cases, such as in the litigation over the GYE grizzly delisting, the Keystone XL pipeline consultation litigation, golden-cheeked warbler petition finding, coastal California gnatcatcher petition finding, Atlantic Coast Pipeline consultation, and the California WaterFix consultation.

DOJ's AR direction has an indirect impact on our FOIA program as well. Interested stakeholders often send FOIA requests for information regarding FWS's ESA decisions in advance of litigation. In past FOIA responses, FWS has often released most, if not all, documents related to its ESA final decisions without undertaking a discerning review for deliberative materials. DOJ's direction on compiling ARs reinforces that we should take great care with our FOIA responses relating to ESA decisions. While it is important to be transparent about agency decisionmaking, we also have an obligation to consider the applicability of FOIA exemptions to decisions and to protect deliberations relating to those decisions when analysis allows us to reasonably foresee harm from releasing related documents and information.

Deliberative Process Privilege under FOIA Exemption 5 and Foreseeable Harm

The deliberative process privilege, with some caveats, allows a federal agency to withhold information from public disclosure if it has not been shared outside the federal government, it is predecisional, and it is deliberative. Predecisional means it predated the decision in question, while deliberative means the document expresses recommendations on legal or policy matters. Further, in addition to a determination that the material qualifies as deliberative, we must reasonably foresee that harm would result from release of the information in order to withhold it. The DOI FOIA Appeals Office requires us to articulate the harm we reasonably foresee from the

release of a document subject to an exemption under FOIA. The office responding to the FOIA request must conduct a foreseeable harm analysis on a case-by-case basis, typically consisting of written documentation stating how many documents were withheld and why, as well as describing the foreseeable harm anticipated if they were released.

In the attached December 29, 2017, memorandum from the Department of the Interior’s Departmental FOIA Officer, addressing the “Foreseeable Harm Standard,” (DOI FOIA Memo) the foreseeable harm arising from the release of materials covered by the deliberative process privilege may include, “...injury to the decisionmaking process, a chilling effect on discussions, hasty or uninformed decisionmaking, and public confusion.” The DOI FOIA Memo includes a chart (pp. 6-7) that provides more information on how to complete a foreseeable harm analysis. For example, the release of notes from a recommendation team meeting on the classification status of a species under the ESA that identified the views of individuals could place those individuals in a negative public light or otherwise subject them to public scrutiny. That in turn could cause a chilling effect on frank conversations amongst staff and/or decisionmakers which would harm the decisionmaking process. While releasing recommendation meeting notes may not cause foreseeable harm, they (along with other documents listed later in this memo) should be carefully reviewed.

If the lead office on a FOIA determines that it should invoke the privilege and withhold documents, it needs to ensure that it has the authority to make calls on withholding and must also consult with SOL on the proposed withholding. It often makes sense not only to work with the SOL attorney assigned to review the withholding, but if a different attorney participated in or reviewed the underlying decision, to consult with that attorney, too, to receive input on withholding determinations.

Additional FOIA Exemption 5 Privileges

In addition to the deliberative process privilege, FOIA Exemption 5 includes two other privileges that FWS has traditionally considered: attorney-client communications and attorney work-product. As set out in the DOI FOIA Memo, the foreseeable harm arising from the release of materials covered by the attorney-client privilege may be that, “...the lawyer would no longer be kept fully informed by their [sic] client, resulting in unsound legal advice and advocacy.” Further, the foreseeable harm arising from releasing attorney work product may include, “...harm to the adversarial trial process by exposing the attorney’s preparation to scrutiny.” Although the DOJ Memo on ARs focused on the deliberative process privilege under Exemption 5, these two additional privileges under that exemption should be carefully considered in processing FOIA requests on FWS decisions subject to APA review. In particular, documents should be reviewed for attorney involvement or communications, including references to and repeating of attorneys’ advice in emails. For further information about these additional Exemption 5 privileges and their application, please consult the DOI FOIA Memo and your office’s FOIA specialist.

General Application of the Deliberative Process Privilege to FWS's FOIA Responses

The need for careful review in our FOIA responses arises as follows:

- As to protecting our decisions in the FOIA context: release of deliberative information could lead to the harms described above, and so we must carefully consider whether foreseeable harm could result from releasing the information.
- As to protecting our decisions in APA litigation:
 - If the FWS fails to withhold appropriately-categorized deliberative information in making a release under FOIA in these instances, the deliberative process privilege over those documents arguably has been waived by the Department.
 - If a citizen subsequently sues the FWS over its decision in the same matter, but FWS does not include deliberative information when compiling the AR in accordance with DOJ policy, the plaintiff could petition the court to order the FWS to supplement the AR with those deliberative documents that were released under the previous FOIA request.
 - Such inadvertent release or failure to include those documents in the AR could also give the court reason to grant discovery beyond the AR, which is burdensome.

While DOJ has acknowledged that they anticipate some record challenges related to the new AR direction, they stated that they are prepared to defend those challenges. Further, there is no expectation that FOIA responses and ARs will be completely consistent, as the standards are different: FOIA's are whether the information is deliberative and foreseeable harm would result; ARs are about the information not being relevant to a court's APA review. Nevertheless, successful defense of our ARs is partially dependent on thoughtful application of Exemption 5 in our FOIA responses.

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOJ's AR direction.

Applying the Deliberative Process Privilege to Specific File Types Relevant to FWS Decisionmaking

During the review of documents where the deliberative process privilege may apply, the following should be considered during thorough document review. This review is typically conducted by the subject matter expert(s) and/or agency FOIA staff and reviewed by the FWS FOIA Officer or Regional FOIA Coordinator and SOL if documents are to be withheld.

- Categories of information and documents that should be considered for withholding in full or in part under Exemption 5's deliberative process privilege, if foreseeable harm could result from release, and a segregability analysis has been undertaken (determining whether certain portions of an otherwise privileged document can be released):
 - Draft outlines, conceptual treatments, etc.;
 - Draft inserts of language for team consideration or inclusion in policy/rule;
 - Draft versions of policies and rules (noting that some versions do not differ substantively from the public versions, or can otherwise be released)
 - Draft responses to public comments, often found within edited spreadsheets produced by regulations.gov, or other systems that sort comments into groupings of substantive vs. non-substantive;
 - Internal comments from other Service offices and regions;
 - Email content that reflects substantive suggestions and interpretations that were never adopted, or tentative analysis and discussion of options;
 - PowerPoints/webinars not shared with audiences external to the federal government;
 - Internal summaries, analyses, and comparative materials (only if a review determines that they are predecisional);
 - Email discussions about who needs to be briefed and the scheduling of such briefings, paying specific attention to any deliberative content;
 - Internal briefing documents that address pre-decisional substantive issues;
 - Decision meeting notes and summaries, score sheets, and memos to file reflecting substantive deliberation and especially participant names, position, or individual decision recommendations.
- Categories of information and documents that are typically released in full:
 - Regulations.gov materials, downloaded directly from regulations.gov (public comments and website generated spreadsheets of public comments and their attachments);
 - Meeting materials, such as agendas (but all substantive information will be considered for redaction);
 - Team email discussions and materials that address meeting agendas, timelines and tasks/assignments so long as they do not discuss specific positions on those topics.

- Transmittal emails that mention that comments are attached but do not reveal the substance of the comments. They will be released even if they mention the topic or the pages where comments are found so long as they do not reveal specific positions/comments (this typically only applies to interagency comments on draft rules coordinated by OMB);
 - Subject lines and attachment names, unless they reveal content that reflects substantive information;
 - Portions of internal agency emails that contain non-substantive communications such as general housekeeping information, transmitting attachments that are OK to release, exchanging pleasantries, and other types of similar non-substantive content;
 - PowerPoints/webinars that have been shared with non-federal audiences;
 - Internal briefing documents that address only procedural issues, such as whether to extend the comment period (though we would redact any attorney-client material);
 - Decision memoranda that reflect the final decision and rationale of the agency; and
 - Final memoranda communicated to OMB Directors.
- Categories of information and documents that may be considered for withholding in part under other exemptions that FWS offices commonly use:
 - Conference lines/passcodes (Exemption 5 as protected under the Commercial Information Privilege);
 - Personal Information - such as personal cell phone numbers, personal email accounts not used to conduct business, or detailed references to medical status or personal life (Exemption 6, Personal Privacy); and
 - Trade secrets and confidential business information, such as proprietary GIS data (Exemption 4)

Consultation/Referral Process for Other Agencies

Consistent with past practice, information originating with or of interest to other bureaus and agencies will require referral to or consultation with that other agency prior to making a final determination on the disposition of that document. This includes, but is not limited to, information such as emails and comments from other agencies, such as CEQ, DOJ, OMB, EPA, etc., as well as documents on their letterhead. Consult with the FWS FOIA Officer or your Regional FOIA Coordinator if the records you have located contain information that originated with another agency. All consultations and referrals must be reviewed and approved by the FWS FOIA Officer.

For Further Information

If you have questions or concerns regarding this guidance, please contact the Branch of Listing Policy and Support in Headquarters (Carey Galst, Parks Gilbert, and Eileen Harke), who will coordinate as appropriate with the FWS FOIA Officer and DOI FOIA SOL. If you have questions about specific FOIA matters, please direct them to your office's FOIA specialist or to the SOL attorney assigned to the FOIA matter.



Galst, Carey <carey_galst@fws.gov>

Fwd: Acting AAG Memorandum on Administrative Records

Gilbert, Parks <parks_gilbert@fws.gov>
To: Carey Galst <Carey_Galst@fws.gov>

Tue, Nov 7, 2017 at 7:57 AM

I'm thinking this is actually in place now, b5-ACC & DP

Parks Gilbert
ESA Litigation Specialist
Branch of Listing Policy and Support, Ecological Services
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
703/358-1758
parks_gilbert@fws.gov

----- Forwarded message -----

From: Chen, Linus <linus.chen@sol.doi.gov>
Date: Mon, Nov 6, 2017 at 2:38 PM
Subject: Fwd: Acting AAG Memorandum on Administrative Records
To: Parks Gilbert <parks_gilbert@fws.gov>

In case you didn't already get this from someone in DPW:

----- Forwarded message -----

From: Haugrud, Kevin <jack.haugrud@sol.doi.gov>
Date: Wed, Nov 1, 2017 at 4:09 PM
Subject: Acting AAG Memorandum on Administrative Records
To: SOL-ANN-ALLEMP <sol-ann-allemp@sol.doi.gov>, SOL-Immediate Office <ios@sol.doi.gov>

b5-ACC & DP

--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

3 attachments

 ENRD Memo - Administrative Record (October 20, 2017).pdf
219K

 WILDLIFE-#301120-v1-WMRS_-_Final_-Price_Mandamus_ Petition_-_Opening_Brief_(9th_ Cir_).PDF
2685K

 WILDLIFE-#301121-v1-WMRS_-_Final_-Price_Mandamus_ Petition_Reply_Brief_(9th_Cir_).PDF
190K



U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

October 20, 2017

MEMORANDUM

To: Selected Agency Counsel

From: Jeffrey H. Wood *[Signature]*
Acting Assistant Attorney General

Re: Administrative Record Compilation in light of
In re Thomas E. Price, Ninth Cir. No. 17-71121

The Environment and Natural Resources Division (“ENRD”) wants to alert you to a petition for writ of mandamus recently filed by the Department of Justice (“DOJ”), which addresses the scope of the administrative record in Administrative Procedure Act (“APA”) record-review litigation. The administrative record compiled by the agency is the focus of judicial review. Success in record-review litigation depends on agencies producing a complete and comprehensive record. As always, administrative records certified by agencies should be forthrightly and expeditiously prepared and be complete.

The mandamus petition, *In re Thomas E. Price*, Ninth Cir. No. 17-71121, expresses DOJ’s view (as authorized by the Office of the Solicitor General) that agency deliberative documents are *not* properly considered part of the administrative record and therefore generally should not be produced as part of the record filed with the court, nor listed in a privilege log. As the *Price* petition explains, agency deliberative documents—*i.e.*, documents reflecting the agency’s predecisional deliberative process—generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making.

As litigation in the Ninth Circuit develops, ENRD intends to provide updated guidance on best practices for handling deliberative documents when producing an administrative record. For now, we want to make sure you know that the *Price* petition represents the view of the United States on this issue, and that any contrary guidance you may have received from ENRD, including the January 1999 document entitled “Guidance to the Federal Agencies in Compiling the Administrative Record,” should be disregarded.¹ This updated guidance is specifically

¹ Please note that a prior December 2008 Assistant Attorney General Memorandum regarding the 1999 document stated that the 1999 document did not dictate any binding requirement for the assembly of the administrative record and should not be read to cast doubt on DOJ’s long-advanced position that deliberative documents generally should not be included in an administrative record. To the extent the 2008 memorandum itself suggested that whether to include deliberative documents in the administrative record is a matter of agency discretion, the position of the

focused on documents that are part of the agency's deliberative process and does not address non-deliberative documents that an agency deems appropriate to include in an administrative record. Agencies should continue to follow their existing practices with regard to non-deliberative documents.

The United States' view of the scope of the administrative record is explained at pages 12–19 of the *Price* petition. To summarize, the proper scope of the administrative record in an APA action is "bounded by the proper scope of administrative review." Pet. 13. Absent a "strong showing of bad faith," administrative review is limited to an agency's stated reasons for its decisions, rather than an interrogation of the agency's subjective motives. *Id.* 13–14. But because inquiry into the agency's internal deliberations is immaterial to the purposes of record-review litigation, and would chill free and frank agency deliberation, deliberative documents are not properly considered part of the administrative record. *Id.* at 15. As such, deliberative documents generally should not be produced as part of the administrative record filed with a court, nor listed in a privilege log.

While it may be appropriate in unusual circumstances for an agency to produce deliberative materials as part of an administrative record, any decision to do so should proceed mindful that inclusion of deliberative materials is a deviation from the usual rule and may serve as a harmful precedent in other cases. Agencies should consult with DOJ attorneys to determine whether special reasons for deviating from the usual rule apply in any particular case or jurisdiction. We also suggest that agencies consider reviewing their existing regulations and guidance for consistency with the position expressed herein. Questions regarding this guidance may be directed to the Law and Policy Section of ENRD.

United States is more correctly stated in the *Price* petition: Such documents generally should not be regarded as part of the record.



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 29 2017

Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

A handwritten signature in black ink that reads "Cindy Cafaro".

I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

II. Background

The FOIA¹ generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.² Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

¹ 5 U.S.C. § 552.

² See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.³

III. Analysis

A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.⁴ Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.⁵ See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL*.
- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.
- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

³ "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See [383 DM 15](#) § 15.6.H.

⁴ See [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

⁵ All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See [383 DM 15](#) § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

CHART 1		
If	Then	And
You decide no FOIA exemption applies to any portion of a responsive record	You cannot withhold it	You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)
You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You must consult with SOL	You do not need to seek additional information from a SME (unless SOL suggests you do so)
You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	<p>After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL</p> <p>After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released)</p>
You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)

B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.⁶ The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.
- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.⁷ If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.⁸ Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

⁶ For example, [these statutes](#) have been found to be covered by Exemption 3.

⁷ For more information on Exemption 4, see [Exemption 4 in a Nutshell](#).

⁸ This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law⁹, however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.¹⁰

Exemption 2: protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

Exemption 5: protects inter-agency or intra-agency materials¹¹ that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

⁹ It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

¹⁰ Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

¹¹ If this threshold is not met, Exemption 5 cannot protect the record. See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uninformed decisionmaking, and public confusion.¹²
- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

CHART 2		
Factors to consider when Exemption 5 applies to a record	The factors lead to questions	And the answers to the questions lead to conclusions
Nature of the decision involved	Is it highly sensitive and/or controversial?	The less sensitive and/or controversial, the less likely foreseeable harm would arise
Nature of the decisionmaking process	Does it require total candor and confidentiality?	The less candor and confidentiality required, the less likely foreseeable harm would arise
Status of the decision	Has the decision been made yet?	If the decision has been made, it is less likely foreseeable harm would arise
Status of the personnel involved	Will the same agency employees, or similarly situated ones, likely be affected by disclosure?	If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise

¹² For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

CHART 2 (CONT.)		
Factors to consider when Exemption 5 applies to a record	The factors lead to questions	And the answers to the questions lead to conclusions
Potential for process impairment	Would there be an actual diminishment if employees felt inhibited by potential disclosure?	If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise
Significance of any process impairment	How strong would the chilling effect be?	If the chilling effect would be weak, it is less likely foreseeable harm would arise
Age of the information in the record	Has the sensitivity faded over time? Was the record created more than 25 years before the request was made?	If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply
Sensitivity of individual record portions	Can the sensitive materials be segregated from non-sensitive materials?	If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

Exemption 8: protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

Exemption 9: protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

IV. Conclusion

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at <https://www.doi.gov/foia/contacts> and/or contact me at 202-208-5342 or at cindy_cafaro@ios.doi.gov.

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

Appendix to Foreseeable Harm Memorandum: Overview.

This Exemption	Generally Protects this Type of Information	If this Exemption Applies then Conduct
Exemption 1	Classified national defense and foreign policy information	No foreseeable harm analysis
Exemption 2	Information related solely to the internal personnel rules and practices of an agency	Detailed foreseeable harm analysis
Exemption 3	Information protected from disclosure by another federal statute	No foreseeable harm analysis
Exemption 4	Trade secrets and commercial or financial information obtained from a person that is privileged or confidential	No foreseeable harm analysis
Exemption 5	Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)	Detailed foreseeable harm analysis
Exemption 6	Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed	Very concise foreseeable harm analysis
Exemption 7	Information compiled for law enforcement purposes, if disclosure: (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source; (E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual	Very concise foreseeable harm analysis
Exemption 8	Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision	Detailed foreseeable harm analysis
Exemption 9	Geological or geophysical information concerning wells	Detailed foreseeable harm analysis

From: [Galst, Carey](#)
To: [Bridget Fahey](#)
Cc: [Carey Gilbert; Eileen Harke](#)
Subject: Skinny AR/FOIA Guidance
Date: Thursday, September 6, 2018 11:40:44 AM
Attachments: [ENRD Memo - Administrative Record \(October 20, 2017\).pdf](#)
[Foreseeable Harm Memo final_Cafaro.pdf](#)
[Haugrud_email.pdf](#)
[20180906_FOIA and Skinny AR guidance.docx](#)

Bridget -

We have cleaned up the skinny AR/FOIA guidance document. I have it attached here and the other relevant pieces of information that are mentioned in the guidance or drove this effort that are ready to be sent out. :)

I was thinking you could send an email out to the ARDs and T/E chiefs and then I can forward that to ES HQ staff. Parks will forward your email to litigation contacts, SAT liaisons, and Joan and Ben. Eileen will forward your email to FOIA contacts, Carrie HM, and Larry Mellinger.

Please let us know if you need anything else.

Here is text for a draft email:

This email transmits guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. Principally in light of the administrative records direction from the Department of Justice last fall, we decided to reassess our approach to FOIA responses, and this guidance reflects and explains that. The attached guidance had input from some HQ and regional staff as well as SOL and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today. If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ.

Thank you -"

><> ><> ><> ><> ><> ><> ><> ><> ><> ><>

Carey Galst-Cavalcante

Chief, Branch of Listing Policy and Support, Ecological Services
U.S. Fish and Wildlife Service Headquarters
5275 Leesburg Pike MS: ES, Falls Church, VA 22041-3803
phone: 703-358-1954; fax: 703-358-1735
email: Carey_Galst@fws.gov



U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

October 20, 2017

MEMORANDUM

To: Selected Agency Counsel

From: Jeffrey H. Wood *[Signature]*
Acting Assistant Attorney General

Re: Administrative Record Compilation in light of
In re Thomas E. Price, Ninth Cir. No. 17-71121

The Environment and Natural Resources Division (“ENRD”) wants to alert you to a petition for writ of mandamus recently filed by the Department of Justice (“DOJ”), which addresses the scope of the administrative record in Administrative Procedure Act (“APA”) record-review litigation. The administrative record compiled by the agency is the focus of judicial review. Success in record-review litigation depends on agencies producing a complete and comprehensive record. As always, administrative records certified by agencies should be forthrightly and expeditiously prepared and be complete.

The mandamus petition, *In re Thomas E. Price*, Ninth Cir. No. 17-71121, expresses DOJ’s view (as authorized by the Office of the Solicitor General) that agency deliberative documents are *not* properly considered part of the administrative record and therefore generally should not be produced as part of the record filed with the court, nor listed in a privilege log. As the *Price* petition explains, agency deliberative documents—*i.e.*, documents reflecting the agency’s predecisional deliberative process—generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making.

As litigation in the Ninth Circuit develops, ENRD intends to provide updated guidance on best practices for handling deliberative documents when producing an administrative record. For now, we want to make sure you know that the *Price* petition represents the view of the United States on this issue, and that any contrary guidance you may have received from ENRD, including the January 1999 document entitled “Guidance to the Federal Agencies in Compiling the Administrative Record,” should be disregarded.¹ This updated guidance is specifically

¹ Please note that a prior December 2008 Assistant Attorney General Memorandum regarding the 1999 document stated that the 1999 document did not dictate any binding requirement for the assembly of the administrative record and should not be read to cast doubt on DOJ’s long-advanced position that deliberative documents generally should not be included in an administrative record. To the extent the 2008 memorandum itself suggested that whether to include deliberative documents in the administrative record is a matter of agency discretion, the position of the

focused on documents that are part of the agency's deliberative process and does not address non-deliberative documents that an agency deems appropriate to include in an administrative record. Agencies should continue to follow their existing practices with regard to non-deliberative documents.

The United States' view of the scope of the administrative record is explained at pages 12–19 of the *Price* petition. To summarize, the proper scope of the administrative record in an APA action is "bounded by the proper scope of administrative review." Pet. 13. Absent a "strong showing of bad faith," administrative review is limited to an agency's stated reasons for its decisions, rather than an interrogation of the agency's subjective motives. *Id.* 13–14. But because inquiry into the agency's internal deliberations is immaterial to the purposes of record-review litigation, and would chill free and frank agency deliberation, deliberative documents are not properly considered part of the administrative record. *Id.* at 15. As such, deliberative documents generally should not be produced as part of the administrative record filed with a court, nor listed in a privilege log.

While it may be appropriate in unusual circumstances for an agency to produce deliberative materials as part of an administrative record, any decision to do so should proceed mindful that inclusion of deliberative materials is a deviation from the usual rule and may serve as a harmful precedent in other cases. Agencies should consult with DOJ attorneys to determine whether special reasons for deviating from the usual rule apply in any particular case or jurisdiction. We also suggest that agencies consider reviewing their existing regulations and guidance for consistency with the position expressed herein. Questions regarding this guidance may be directed to the Law and Policy Section of ENRD.

United States is more correctly stated in the *Price* petition: Such documents generally should not be regarded as part of the record.



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 29 2017

Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

A handwritten signature in black ink that reads "Cindy Cafaro".

I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

II. Background

The FOIA¹ generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.² Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

¹ 5 U.S.C. § 552.

² See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.³

III. Analysis

A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.⁴ Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.⁵ See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL*.
- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.
- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

³ "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See [383 DM 15](#) § 15.6.H.

⁴ See [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

⁵ All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See [383 DM 15](#) § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

CHART 1		
If	Then	And
You decide no FOIA exemption applies to any portion of a responsive record	You cannot withhold it	You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)
You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You must consult with SOL	You do not need to seek additional information from a SME (unless SOL suggests you do so)
You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	<p>After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL</p> <p>After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released)</p>
You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)

B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.⁶ The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.
- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.⁷ If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.⁸ Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

⁶ For example, [these statutes](#) have been found to be covered by Exemption 3.

⁷ For more information on Exemption 4, see [Exemption 4 in a Nutshell](#).

⁸ This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law⁹, however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.¹⁰

Exemption 2: protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

Exemption 5: protects inter-agency or intra-agency materials¹¹ that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

⁹ It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

¹⁰ Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

¹¹ If this threshold is not met, Exemption 5 cannot protect the record. See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uninformed decisionmaking, and public confusion.¹²
- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

CHART 2		
Factors to consider when Exemption 5 applies to a record	The factors lead to questions	And the answers to the questions lead to conclusions
Nature of the decision involved	Is it highly sensitive and/or controversial?	The less sensitive and/or controversial, the less likely foreseeable harm would arise
Nature of the decisionmaking process	Does it require total candor and confidentiality?	The less candor and confidentiality required, the less likely foreseeable harm would arise
Status of the decision	Has the decision been made yet?	If the decision has been made, it is less likely foreseeable harm would arise
Status of the personnel involved	Will the same agency employees, or similarly situated ones, likely be affected by disclosure?	If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise

¹² For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

CHART 2 (CONT.)		
Factors to consider when Exemption 5 applies to a record	The factors lead to questions	And the answers to the questions lead to conclusions
Potential for process impairment	Would there be an actual diminishment if employees felt inhibited by potential disclosure?	If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise
Significance of any process impairment	How strong would the chilling effect be?	If the chilling effect would be weak, it is less likely foreseeable harm would arise
Age of the information in the record	Has the sensitivity faded over time? Was the record created more than 25 years before the request was made?	If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply
Sensitivity of individual record portions	Can the sensitive materials be segregated from non-sensitive materials?	If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

Exemption 8: protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

Exemption 9: protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

IV. Conclusion

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at <https://www.doi.gov/foia/contacts> and/or contact me at 202-208-5342 or at cindy_cafaro@ios.doi.gov.

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

Appendix to Foreseeable Harm Memorandum: Overview.

This Exemption	Generally Protects this Type of Information	If this Exemption Applies then Conduct
Exemption 1	Classified national defense and foreign policy information	No foreseeable harm analysis
Exemption 2	Information related solely to the internal personnel rules and practices of an agency	Detailed foreseeable harm analysis
Exemption 3	Information protected from disclosure by another federal statute	No foreseeable harm analysis
Exemption 4	Trade secrets and commercial or financial information obtained from a person that is privileged or confidential	No foreseeable harm analysis
Exemption 5	Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)	Detailed foreseeable harm analysis
Exemption 6	Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed	Very concise foreseeable harm analysis
Exemption 7	Information compiled for law enforcement purposes, if disclosure: (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source; (E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual	Very concise foreseeable harm analysis
Exemption 8	Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision	Detailed foreseeable harm analysis
Exemption 9	Geological or geophysical information concerning wells	Detailed foreseeable harm analysis



Galst, Carey <carey_galst@fws.gov>

Fwd: Acting AAG Memorandum on Administrative Records

Gilbert, Parks <parks_gilbert@fws.gov>
To: Carey Galst <Carey_Galst@fws.gov>

Tue, Nov 7, 2017 at 7:57 AM

I'm thinking this is actually in place now, b5-ACC & DP

Parks Gilbert
ESA Litigation Specialist
Branch of Listing Policy and Support, Ecological Services
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
703/358-1758
parks_gilbert@fws.gov

----- Forwarded message -----

From: Chen, Linus <linus.chen@sol.doi.gov>
Date: Mon, Nov 6, 2017 at 2:38 PM
Subject: Fwd: Acting AAG Memorandum on Administrative Records
To: Parks Gilbert <parks_gilbert@fws.gov>

In case you didn't already get this from someone in DPW:

----- Forwarded message -----

From: Haugrud, Kevin <jack.haugrud@sol.doi.gov>
Date: Wed, Nov 1, 2017 at 4:09 PM
Subject: Acting AAG Memorandum on Administrative Records
To: SOL-ANN-ALLEMP <sol-ann-allemp@sol.doi.gov>, SOL-Immediate Office <ios@sol.doi.gov>

b5-ACC & DP

--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

3 attachments

 ENRD Memo - Administrative Record (October 20, 2017).pdf
219K

 WILDLIFE-#301120-v1-WMRS_-_Final_-Price_Mandamus_ Petition_-_Opening_Brief_(9th_ Cir_).PDF
2685K

 WILDLIFE-#301121-v1-WMRS_-_Final_-Price_Mandamus_ Petition_Reply_Brief_(9th_Cir_).PDF
190K

Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records

Purpose of this Document

To ensure consistent application of the attached Department of Justice Environment and Natural Resources Division's (DOJ) October 20, 2017, administrative record (AR) guidance, this document provides recommendations to Fish and Wildlife Service Ecological Services (FWS) staff for reviewing, redacting, and withholding deliberative information responsive to Freedom of Information Act (FOIA) requests. Specifically, we provide recommendations and considerations for when withholding records as deliberative under FOIA Exemption 5 (5 USC 552(b)(5)) may be appropriate. After identifying documents that should be considered for withholding as deliberative under FOIA Exemption 5, it is incumbent upon FWS personnel engaged in the review process to review all responsive documents, redact them as appropriate, and release any parts of documents that do not qualify for withholding, (i.e., materials that are not deliberative, or would not foreseeably harm the Agency's decision making process if they were released). Where we invoke the deliberative process privilege, FWS must consult with the Department of Interior Solicitor's Office (SOL) to confirm the propriety of invoking FOIA Exemption 5, or other FOIA exemptions.

Note that this document is not intended to be absolute in directing FWS personnel on how to treat all predecisional information in responding to a FOIA request (i.e., it is not suggesting that FWS automatically withhold all such information), nor to replace an appropriate foreseeable harm analysis. Rather, this document is intended to raise awareness of the need to process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could be subsequently included in an AR pursuant to Administrative Procedure Act (APA) litigation involving FWS decisions. While this document will be most useful for Endangered Species Act (ESA) matters, it also applies to FOIAs relating to other laws that are administered by FWS, such as the National Environmental Policy Act, Coastal Barrier Resources Act, Federal Power Act, Bald & Golden Eagle Protection Act, etc., but ESA is the primary focus.

Background

The October 20, 2017, DOJ memorandum clarifies that an AR associated with litigation on an agency decision under the APA should not include deliberative documents. Specifically, the memorandum explains that, "documents reflecting the agency's predecisional deliberative process – generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making." Courts generally review FWS's decisions under APA standards.

Implementing this policy will require a change in the way the FWS compiles ARs for court cases. Previously, it was common practice for the FWS to include deliberative documents in its ARs, even though the agency could have asserted they were deliberative process-privileged, and ARs tended to be voluminous. However, some ARs that have been prepared for programmatic rules or policies and for national consultations have generally not included deliberative documents. For example, ARs on the:

- Policy on Significant Portion of Its Range did not include many substantive emails exchanged during the development of the draft and final policies, nor did it include some drafts of the policy, intra- and inter-agency comments on the policies, and certainly attorney-client privileged materials.
- Section 7 consultation on EPA's Clean Water Act 316(b) rule, which regulates how cooling water intake structures at plants are to operate to avoid harming listed species, we withheld and listed in a privilege log draft biological opinions and reasonable and prudent alternatives, emails containing inter- and intra-agency comments on the drafts, and briefing papers.

Recently (late 2017-early 2018), DOJ has also required that we prepare more limited ARs for non-programmatic ESA cases, such as in the litigation over the GYE grizzly delisting, the Keystone XL pipeline consultation litigation, golden-cheeked warbler petition finding, coastal California gnatcatcher petition finding, Atlantic Coast Pipeline consultation, and the California WaterFix consultation.

DOJ's AR direction has an indirect impact on our FOIA program as well. Interested stakeholders often send FOIA requests for information regarding FWS's ESA decisions in advance of litigation. In past FOIA responses, FWS has often released most, if not all, documents related to its ESA final decisions without undertaking a discerning review for deliberative materials. DOJ's direction on compiling ARs reinforces that we should take great care with our FOIA responses relating to ESA decisions. While it is important to be transparent about agency decisionmaking, we also have an obligation to consider the applicability of FOIA exemptions to decisions and to protect deliberations relating to those decisions when analysis allows us to reasonably foresee harm from releasing related documents and information.

Deliberative Process Privilege under FOIA Exemption 5 and Foreseeable Harm

The deliberative process privilege, with some caveats, allows a federal agency to withhold information from public disclosure if it has not been shared outside the federal government, it is predecisional, and it is deliberative. Predecisional means it predated the decision in question, while deliberative means the document expresses recommendations on legal or policy matters. Further, in addition to a determination that the material qualifies as deliberative, we must reasonably foresee that harm would result from release of the information in order to withhold it. The DOI FOIA Appeals Office requires us to articulate the harm we reasonably foresee from the

release of a document subject to an exemption under FOIA. The office responding to the FOIA request must conduct a foreseeable harm analysis on a case-by-case basis, typically consisting of written documentation stating how many documents were withheld and why, as well as describing the foreseeable harm anticipated if they were released.

In the attached December 29, 2017, memorandum from the Department of the Interior’s Departmental FOIA Officer, addressing the “Foreseeable Harm Standard,” (DOI FOIA Memo) the foreseeable harm arising from the release of materials covered by the deliberative process privilege may include, “...injury to the decisionmaking process, a chilling effect on discussions, hasty or uninformed decisionmaking, and public confusion.” The DOI FOIA Memo includes a chart (pp. 6-7) that provides more information on how to complete a foreseeable harm analysis. For example, the release of notes from a recommendation team meeting on the classification status of a species under the ESA that identified the views of individuals could place those individuals in a negative public light or otherwise subject them to public scrutiny. That in turn could cause a chilling effect on frank conversations amongst staff and/or decisionmakers which would harm the decisionmaking process. While releasing recommendation meeting notes may not cause foreseeable harm, they (along with other documents listed later in this memo) should be carefully reviewed.

If the lead office on a FOIA determines that it should invoke the privilege and withhold documents, it needs to ensure that it has the authority to make calls on withholding and must also consult with SOL on the proposed withholding. It often makes sense not only to work with the SOL attorney assigned to review the withholding, but if a different attorney participated in or reviewed the underlying decision, to consult with that attorney, too, to receive input on withholding determinations.

Additional FOIA Exemption 5 Privileges

In addition to the deliberative process privilege, FOIA Exemption 5 includes two other privileges that FWS has traditionally considered: attorney-client communications and attorney work-product. As set out in the DOI FOIA Memo, the foreseeable harm arising from the release of materials covered by the attorney-client privilege may be that, “...the lawyer would no longer be kept fully informed by their [sic] client, resulting in unsound legal advice and advocacy.” Further, the foreseeable harm arising from releasing attorney work product may include, “...harm to the adversarial trial process by exposing the attorney’s preparation to scrutiny.” Although the DOJ Memo on ARs focused on the deliberative process privilege under Exemption 5, these two additional privileges under that exemption should be carefully considered in processing FOIA requests on FWS decisions subject to APA review. In particular, documents should be reviewed for attorney involvement or communications, including references to and repeating of attorneys’ advice in emails. For further information about these additional Exemption 5 privileges and their application, please consult the DOI FOIA Memo and your office’s FOIA specialist.

General Application of the Deliberative Process Privilege to FWS's FOIA Responses

The need for careful review in our FOIA responses arises as follows:

- As to protecting our decisions in the FOIA context: release of deliberative information could lead to the harms described above, and so we must carefully consider whether foreseeable harm could result from releasing the information.
- As to protecting our decisions in APA litigation:
 - If the FWS fails to withhold appropriately-categorized deliberative information in making a release under FOIA in these instances, the deliberative process privilege over those documents arguably has been waived by the Department.
 - If a citizen subsequently sues the FWS over its decision in the same matter, but FWS does not include deliberative information when compiling the AR in accordance with DOJ policy, the plaintiff could petition the court to order the FWS to supplement the AR with those deliberative documents that were released under the previous FOIA request.
 - Such inadvertent release or failure to include those documents in the AR could also give the court reason to grant discovery beyond the AR, which is burdensome.

While DOJ has acknowledged that they anticipate some record challenges related to the new AR direction, they stated that they are prepared to defend those challenges. Further, there is no expectation that FOIA responses and ARs will be completely consistent, as the standards are different: FOIA's are whether the information is deliberative and foreseeable harm would result; ARs are about the information not being relevant to a court's APA review. Nevertheless, successful defense of our ARs is partially dependent on thoughtful application of Exemption 5 in our FOIA responses.

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOJ's AR direction.

Applying the Deliberative Process Privilege to Specific File Types Relevant to FWS Decisionmaking

During the review of documents where the deliberative process privilege may apply, the following should be considered during thorough document review. This review is typically conducted by the subject matter expert(s) and/or agency FOIA staff and reviewed by the FWS FOIA Officer or Regional FOIA Coordinator and SOL if documents are to be withheld.

- Categories of information and documents that should be considered for withholding in full or in part under Exemption 5's deliberative process privilege, if foreseeable harm could result from release, and a segregability analysis has been undertaken (determining whether certain portions of an otherwise privileged document can be released):
 - Draft outlines, conceptual treatments, etc.;
 - Draft inserts of language for team consideration or inclusion in policy/rule;
 - Draft versions of policies and rules (noting that some versions do not differ substantively from the public versions, or can otherwise be released)
 - Draft responses to public comments, often found within edited spreadsheets produced by regulations.gov, or other systems that sort comments into groupings of substantive vs. non-substantive;
 - Internal comments from other Service offices and regions;
 - Email content that reflects substantive suggestions and interpretations that were never adopted, or tentative analysis and discussion of options;
 - PowerPoints/webinars not shared with audiences external to the federal government;
 - Internal summaries, analyses, and comparative materials (only if a review determines that they are predecisional);
 - Email discussions about who needs to be briefed and the scheduling of such briefings, paying specific attention to any deliberative content;
 - Internal briefing documents that address pre-decisional substantive issues;
 - Decision meeting notes and summaries, score sheets, and memos to file reflecting substantive deliberation and especially participant names, position, or individual decision recommendations.
- Categories of information and documents that are typically released in full:
 - Regulations.gov materials, downloaded directly from regulations.gov (public comments and website generated spreadsheets of public comments and their attachments);
 - Meeting materials, such as agendas (but all substantive information will be considered for redaction);
 - Team email discussions and materials that address meeting agendas, timelines and tasks/assignments so long as they do not discuss specific positions on those topics.

- Transmittal emails that mention that comments are attached but do not reveal the substance of the comments. They will be released even if they mention the topic or the pages where comments are found so long as they do not reveal specific positions/comments (this typically only applies to interagency comments on draft rules coordinated by OMB);
 - Subject lines and attachment names, unless they reveal content that reflects substantive information;
 - Portions of internal agency emails that contain non-substantive communications such as general housekeeping information, transmitting attachments that are OK to release, exchanging pleasantries, and other types of similar non-substantive content;
 - PowerPoints/webinars that have been shared with non-federal audiences;
 - Internal briefing documents that address only procedural issues, such as whether to extend the comment period (though we would redact any attorney-client material);
 - Decision memoranda that reflect the final decision and rationale of the agency; and
 - Final memoranda communicated to OMB Directors.
- Categories of information and documents that may be considered for withholding in part under other exemptions that FWS offices commonly use:
 - Conference lines/passcodes (Exemption 5 as protected under the Commercial Information Privilege);
 - Personal Information - such as personal cell phone numbers, personal email accounts not used to conduct business, or detailed references to medical status or personal life (Exemption 6, Personal Privacy); and
 - Trade secrets and confidential business information, such as proprietary GIS data (Exemption 4)

Consultation/Referral Process for Other Agencies

Consistent with past practice, information originating with or of interest to other bureaus and agencies will require referral to or consultation with that other agency prior to making a final determination on the disposition of that document. This includes, but is not limited to, information such as emails and comments from other agencies, such as CEQ, DOJ, OMB, EPA, etc., as well as documents on their letterhead. Consult with the FWS FOIA Officer or your Regional FOIA Coordinator if the records you have located contain information that originated with another agency. All consultations and referrals must be reviewed and approved by the FWS FOIA Officer.

For Further Information

If you have questions or concerns regarding this guidance, please contact the Branch of Listing Policy and Support in Headquarters (Carey Galst, Parks Gilbert, and Eileen Harke), who will coordinate as appropriate with the FWS FOIA Officer and DOI FOIA SOL. If you have questions about specific FOIA matters, please direct them to your office's FOIA specialist or to the SOL attorney assigned to the FOIA matter.

From: [Gilbert, Parks](#)
To: [Aaron Valenta](#); [Drew Crane](#); [Kathleen Moynan](#); [Krishna Gifford](#); [Laura Ragan](#); [Melanie Ikenson](#); [Michael Long](#); [Robert Tawes](#); [Sarah Backsen](#); [Timothy Merritt](#); [Barbara Hosler](#); [Justin Shoemaker](#); [Kit Hershey](#); [Russell, Daniel](#); [Shawn Sartorius](#); [Joan Goldfarb](#); [Benjamin Jesup](#); [Chen, Linus](#); [Nancy Brown-Kobil](#)
Subject: Fwd: Skinny Administrative Record/FOIA Guidance
Date: Thursday, September 6, 2018 12:43:16 PM
Attachments: [ENRD Memo - Administrative Record \(October 20, 2017\).pdf](#)
[Foreseeable Harm Memo final_Cafaro.pdf](#)
[Haugrud_email.pdf](#)
[20180906 FOIA and Skinny AR guidance.docx](#)

Hey all, here is the long-awaited (at least on my branch's part) skinny AR/FOIA guidance.
Please reach out with any questions.

Thanks,

Parks

Parks Gilbert
Endangered Species Act Litigation Specialist
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
(703) 358-1758
parks_gilbert@fws.gov

----- Forwarded message -----

From: **Fahey, Bridget** <bridget_fahey@fws.gov>
Date: Thu, Sep 6, 2018 at 12:37 PM
Subject: Skinny Administrative Record/FOIA Guidance
To: FWS ES Regional ARDs <fws_es_regionals_aruds@fws.gov>, FWS ES Deputy ARDs <fws_es_deputy_aruds@fws.gov>, Susan Jacobsen <Susan_Jacobsen@fws.gov>, Alisa Shull <alisa_shull@fws.gov>, Sarah Quamme <Sarah_Quamme@fws.gov>, Aaron Valenta <Aaron_Valenta@fws.gov>, Don Morgan <Don_Morgan@fws.gov>, Gina Shultz <Gina_Shultz@fws.gov>, Drew Crane <drew_crane@fws.gov>, Jeff Newman <jeff_newman@fws.gov>, Marilet Zablan <marilet_zablan@fws.gov>, Marjorie Nelson <marjorie_nelson@fws.gov>, Martin Miller <martin_miller@fws.gov>, Long, Michael <michael_long@fws.gov>, Merritt, Timothy <timothy_merritt@fws.gov>, Aubrey, Craig <craig_aubrey@fws.gov>, Frazer, Gary <gary_frazer@fws.gov>
Cc: Parks Gilbert <parks_gilbert@fws.gov>, Eileen Harke <eileen_harke@fws.gov>, Carey Galst <Carey_Galst@fws.gov>

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ -

- let us know if you are interested in such a webinar.

Thank you!

Bridget Fahey
Division Chief for Conservation and Classification
U.S. Fish and Wildlife Service
(703) 358-2163



U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

October 20, 2017

MEMORANDUM

To: Selected Agency Counsel

From: Jeffrey H. Wood *[Signature]*
Acting Assistant Attorney General

Re: Administrative Record Compilation in light of
In re Thomas E. Price, Ninth Cir. No. 17-71121

The Environment and Natural Resources Division (“ENRD”) wants to alert you to a petition for writ of mandamus recently filed by the Department of Justice (“DOJ”), which addresses the scope of the administrative record in Administrative Procedure Act (“APA”) record-review litigation. The administrative record compiled by the agency is the focus of judicial review. Success in record-review litigation depends on agencies producing a complete and comprehensive record. As always, administrative records certified by agencies should be forthrightly and expeditiously prepared and be complete.

The mandamus petition, *In re Thomas E. Price*, Ninth Cir. No. 17-71121, expresses DOJ’s view (as authorized by the Office of the Solicitor General) that agency deliberative documents are *not* properly considered part of the administrative record and therefore generally should not be produced as part of the record filed with the court, nor listed in a privilege log. As the *Price* petition explains, agency deliberative documents—*i.e.*, documents reflecting the agency’s predecisional deliberative process—generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making.

As litigation in the Ninth Circuit develops, ENRD intends to provide updated guidance on best practices for handling deliberative documents when producing an administrative record. For now, we want to make sure you know that the *Price* petition represents the view of the United States on this issue, and that any contrary guidance you may have received from ENRD, including the January 1999 document entitled “Guidance to the Federal Agencies in Compiling the Administrative Record,” should be disregarded.¹ This updated guidance is specifically

¹ Please note that a prior December 2008 Assistant Attorney General Memorandum regarding the 1999 document stated that the 1999 document did not dictate any binding requirement for the assembly of the administrative record and should not be read to cast doubt on DOJ’s long-advanced position that deliberative documents generally should not be included in an administrative record. To the extent the 2008 memorandum itself suggested that whether to include deliberative documents in the administrative record is a matter of agency discretion, the position of the

focused on documents that are part of the agency's deliberative process and does not address non-deliberative documents that an agency deems appropriate to include in an administrative record. Agencies should continue to follow their existing practices with regard to non-deliberative documents.

The United States' view of the scope of the administrative record is explained at pages 12–19 of the *Price* petition. To summarize, the proper scope of the administrative record in an APA action is "bounded by the proper scope of administrative review." Pet. 13. Absent a "strong showing of bad faith," administrative review is limited to an agency's stated reasons for its decisions, rather than an interrogation of the agency's subjective motives. *Id.* 13–14. But because inquiry into the agency's internal deliberations is immaterial to the purposes of record-review litigation, and would chill free and frank agency deliberation, deliberative documents are not properly considered part of the administrative record. *Id.* at 15. As such, deliberative documents generally should not be produced as part of the administrative record filed with a court, nor listed in a privilege log.

While it may be appropriate in unusual circumstances for an agency to produce deliberative materials as part of an administrative record, any decision to do so should proceed mindful that inclusion of deliberative materials is a deviation from the usual rule and may serve as a harmful precedent in other cases. Agencies should consult with DOJ attorneys to determine whether special reasons for deviating from the usual rule apply in any particular case or jurisdiction. We also suggest that agencies consider reviewing their existing regulations and guidance for consistency with the position expressed herein. Questions regarding this guidance may be directed to the Law and Policy Section of ENRD.

United States is more correctly stated in the *Price* petition: Such documents generally should not be regarded as part of the record.



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 29 2017

Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

A handwritten signature in black ink that reads "Cindy Cafaro".

I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

II. Background

The FOIA¹ generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.² Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

¹ 5 U.S.C. § 552.

² See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.³

III. Analysis

A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.⁴ Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.⁵ See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL*.
- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.
- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

³ "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See [383 DM 15](#) § 15.6.H.

⁴ See [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

⁵ All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See [383 DM 15](#) § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

CHART 1		
If	Then	And
You decide no FOIA exemption applies to any portion of a responsive record	You cannot withhold it	You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)
You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You must consult with SOL	You do not need to seek additional information from a SME (unless SOL suggests you do so)
You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	<p>After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL</p> <p>After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released)</p>
You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)

B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.⁶ The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.
- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.⁷ If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.⁸ Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

⁶ For example, [these statutes](#) have been found to be covered by Exemption 3.

⁷ For more information on Exemption 4, see [Exemption 4 in a Nutshell](#).

⁸ This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law⁹, however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.¹⁰

Exemption 2: protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

Exemption 5: protects inter-agency or intra-agency materials¹¹ that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

⁹ It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

¹⁰ Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

¹¹ If this threshold is not met, Exemption 5 cannot protect the record. See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uninformed decisionmaking, and public confusion.¹²
- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

CHART 2		
Factors to consider when Exemption 5 applies to a record	The factors lead to questions	And the answers to the questions lead to conclusions
Nature of the decision involved	Is it highly sensitive and/or controversial?	The less sensitive and/or controversial, the less likely foreseeable harm would arise
Nature of the decisionmaking process	Does it require total candor and confidentiality?	The less candor and confidentiality required, the less likely foreseeable harm would arise
Status of the decision	Has the decision been made yet?	If the decision has been made, it is less likely foreseeable harm would arise
Status of the personnel involved	Will the same agency employees, or similarly situated ones, likely be affected by disclosure?	If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise

¹² For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

CHART 2 (CONT.)		
Factors to consider when Exemption 5 applies to a record	The factors lead to questions	And the answers to the questions lead to conclusions
Potential for process impairment	Would there be an actual diminishment if employees felt inhibited by potential disclosure?	If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise
Significance of any process impairment	How strong would the chilling effect be?	If the chilling effect would be weak, it is less likely foreseeable harm would arise
Age of the information in the record	Has the sensitivity faded over time? Was the record created more than 25 years before the request was made?	If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply
Sensitivity of individual record portions	Can the sensitive materials be segregated from non-sensitive materials?	If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

Exemption 8: protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

Exemption 9: protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

IV. Conclusion

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at <https://www.doi.gov/foia/contacts> and/or contact me at 202-208-5342 or at cindy_cafaro@ios.doi.gov.

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

Appendix to Foreseeable Harm Memorandum: Overview.

This Exemption	Generally Protects this Type of Information	If this Exemption Applies then Conduct
Exemption 1	Classified national defense and foreign policy information	No foreseeable harm analysis
Exemption 2	Information related solely to the internal personnel rules and practices of an agency	Detailed foreseeable harm analysis
Exemption 3	Information protected from disclosure by another federal statute	No foreseeable harm analysis
Exemption 4	Trade secrets and commercial or financial information obtained from a person that is privileged or confidential	No foreseeable harm analysis
Exemption 5	Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)	Detailed foreseeable harm analysis
Exemption 6	Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed	Very concise foreseeable harm analysis
Exemption 7	Information compiled for law enforcement purposes, if disclosure: (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source; (E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual	Very concise foreseeable harm analysis
Exemption 8	Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision	Detailed foreseeable harm analysis
Exemption 9	Geological or geophysical information concerning wells	Detailed foreseeable harm analysis



Galst, Carey <carey_galst@fws.gov>

Fwd: Acting AAG Memorandum on Administrative Records

Gilbert, Parks <parks_gilbert@fws.gov>
To: Carey Galst <Carey_Galst@fws.gov>

Tue, Nov 7, 2017 at 7:57 AM

I'm thinking this is actually in place now, b5-ACC & DP

Parks Gilbert
ESA Litigation Specialist
Branch of Listing Policy and Support, Ecological Services
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
703/358-1758
parks_gilbert@fws.gov

----- Forwarded message -----

From: Chen, Linus <linus.chen@sol.doi.gov>
Date: Mon, Nov 6, 2017 at 2:38 PM
Subject: Fwd: Acting AAG Memorandum on Administrative Records
To: Parks Gilbert <parks_gilbert@fws.gov>

In case you didn't already get this from someone in DPW:

----- Forwarded message -----

From: Haugrud, Kevin <jack.haugrud@sol.doi.gov>
Date: Wed, Nov 1, 2017 at 4:09 PM
Subject: Acting AAG Memorandum on Administrative Records
To: SOL-ANN-ALLEMP <sol-ann-allemp@sol.doi.gov>, SOL-Immediate Office <ios@sol.doi.gov>

b5-ACC & DP

--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

3 attachments

 ENRD Memo - Administrative Record (October 20, 2017).pdf
219K

 WILDLIFE-#301120-v1-WMRS_-_Final_-Price_Mandamus_ Petition_-_Opening_Brief_(9th_ Cir_).PDF
2685K

 WILDLIFE-#301121-v1-WMRS_-_Final_-Price_Mandamus_ Petition_Reply_Brief_(9th_Cir_).PDF
190K

Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records

Purpose of this Document

To ensure consistent application of the attached Department of Justice Environment and Natural Resources Division's (DOJ) October 20, 2017, administrative record (AR) guidance, this document provides recommendations to Fish and Wildlife Service Ecological Services (FWS) staff for reviewing, redacting, and withholding deliberative information responsive to Freedom of Information Act (FOIA) requests. Specifically, we provide recommendations and considerations for when withholding records as deliberative under FOIA Exemption 5 (5 USC 552(b)(5)) may be appropriate. After identifying documents that should be considered for withholding as deliberative under FOIA Exemption 5, it is incumbent upon FWS personnel engaged in the review process to review all responsive documents, redact them as appropriate, and release any parts of documents that do not qualify for withholding, (i.e., materials that are not deliberative, or would not foreseeably harm the Agency's decision making process if they were released). Where we invoke the deliberative process privilege, FWS must consult with the Department of Interior Solicitor's Office (SOL) to confirm the propriety of invoking FOIA Exemption 5, or other FOIA exemptions.

Note that this document is not intended to be absolute in directing FWS personnel on how to treat all predecisional information in responding to a FOIA request (i.e., it is not suggesting that FWS automatically withhold all such information), nor to replace an appropriate foreseeable harm analysis. Rather, this document is intended to raise awareness of the need to process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could be subsequently included in an AR pursuant to Administrative Procedure Act (APA) litigation involving FWS decisions. While this document will be most useful for Endangered Species Act (ESA) matters, it also applies to FOIAs relating to other laws that are administered by FWS, such as the National Environmental Policy Act, Coastal Barrier Resources Act, Federal Power Act, Bald & Golden Eagle Protection Act, etc., but ESA is the primary focus.

Background

The October 20, 2017, DOJ memorandum clarifies that an AR associated with litigation on an agency decision under the APA should not include deliberative documents. Specifically, the memorandum explains that, "documents reflecting the agency's predecisional deliberative process – generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making." Courts generally review FWS's decisions under APA standards.

Implementing this policy will require a change in the way the FWS compiles ARs for court cases. Previously, it was common practice for the FWS to include deliberative documents in its ARs, even though the agency could have asserted they were deliberative process-privileged, and ARs tended to be voluminous. However, some ARs that have been prepared for programmatic rules or policies and for national consultations have generally not included deliberative documents. For example, ARs on the:

- Policy on Significant Portion of Its Range did not include many substantive emails exchanged during the development of the draft and final policies, nor did it include some drafts of the policy, intra- and inter-agency comments on the policies, and certainly attorney-client privileged materials.
- Section 7 consultation on EPA's Clean Water Act 316(b) rule, which regulates how cooling water intake structures at plants are to operate to avoid harming listed species, we withheld and listed in a privilege log draft biological opinions and reasonable and prudent alternatives, emails containing inter- and intra-agency comments on the drafts, and briefing papers.

Recently (late 2017-early 2018), DOJ has also required that we prepare more limited ARs for non-programmatic ESA cases, such as in the litigation over the GYE grizzly delisting, the Keystone XL pipeline consultation litigation, golden-cheeked warbler petition finding, coastal California gnatcatcher petition finding, Atlantic Coast Pipeline consultation, and the California WaterFix consultation.

DOJ's AR direction has an indirect impact on our FOIA program as well. Interested stakeholders often send FOIA requests for information regarding FWS's ESA decisions in advance of litigation. In past FOIA responses, FWS has often released most, if not all, documents related to its ESA final decisions without undertaking a discerning review for deliberative materials. DOJ's direction on compiling ARs reinforces that we should take great care with our FOIA responses relating to ESA decisions. While it is important to be transparent about agency decisionmaking, we also have an obligation to consider the applicability of FOIA exemptions to decisions and to protect deliberations relating to those decisions when analysis allows us to reasonably foresee harm from releasing related documents and information.

Deliberative Process Privilege under FOIA Exemption 5 and Foreseeable Harm

The deliberative process privilege, with some caveats, allows a federal agency to withhold information from public disclosure if it has not been shared outside the federal government, it is predecisional, and it is deliberative. Predecisional means it predated the decision in question, while deliberative means the document expresses recommendations on legal or policy matters. Further, in addition to a determination that the material qualifies as deliberative, we must reasonably foresee that harm would result from release of the information in order to withhold it. The DOI FOIA Appeals Office requires us to articulate the harm we reasonably foresee from the

release of a document subject to an exemption under FOIA. The office responding to the FOIA request must conduct a foreseeable harm analysis on a case-by-case basis, typically consisting of written documentation stating how many documents were withheld and why, as well as describing the foreseeable harm anticipated if they were released.

In the attached December 29, 2017, memorandum from the Department of the Interior’s Departmental FOIA Officer, addressing the “Foreseeable Harm Standard,” (DOI FOIA Memo) the foreseeable harm arising from the release of materials covered by the deliberative process privilege may include, “...injury to the decisionmaking process, a chilling effect on discussions, hasty or uninformed decisionmaking, and public confusion.” The DOI FOIA Memo includes a chart (pp. 6-7) that provides more information on how to complete a foreseeable harm analysis. For example, the release of notes from a recommendation team meeting on the classification status of a species under the ESA that identified the views of individuals could place those individuals in a negative public light or otherwise subject them to public scrutiny. That in turn could cause a chilling effect on frank conversations amongst staff and/or decisionmakers which would harm the decisionmaking process. While releasing recommendation meeting notes may not cause foreseeable harm, they (along with other documents listed later in this memo) should be carefully reviewed.

If the lead office on a FOIA determines that it should invoke the privilege and withhold documents, it needs to ensure that it has the authority to make calls on withholding and must also consult with SOL on the proposed withholding. It often makes sense not only to work with the SOL attorney assigned to review the withholding, but if a different attorney participated in or reviewed the underlying decision, to consult with that attorney, too, to receive input on withholding determinations.

Additional FOIA Exemption 5 Privileges

In addition to the deliberative process privilege, FOIA Exemption 5 includes two other privileges that FWS has traditionally considered: attorney-client communications and attorney work-product. As set out in the DOI FOIA Memo, the foreseeable harm arising from the release of materials covered by the attorney-client privilege may be that, “...the lawyer would no longer be kept fully informed by their [sic] client, resulting in unsound legal advice and advocacy.” Further, the foreseeable harm arising from releasing attorney work product may include, “...harm to the adversarial trial process by exposing the attorney’s preparation to scrutiny.” Although the DOJ Memo on ARs focused on the deliberative process privilege under Exemption 5, these two additional privileges under that exemption should be carefully considered in processing FOIA requests on FWS decisions subject to APA review. In particular, documents should be reviewed for attorney involvement or communications, including references to and repeating of attorneys’ advice in emails. For further information about these additional Exemption 5 privileges and their application, please consult the DOI FOIA Memo and your office’s FOIA specialist.

General Application of the Deliberative Process Privilege to FWS's FOIA Responses

The need for careful review in our FOIA responses arises as follows:

- As to protecting our decisions in the FOIA context: release of deliberative information could lead to the harms described above, and so we must carefully consider whether foreseeable harm could result from releasing the information.
- As to protecting our decisions in APA litigation:
 - If the FWS fails to withhold appropriately-categorized deliberative information in making a release under FOIA in these instances, the deliberative process privilege over those documents arguably has been waived by the Department.
 - If a citizen subsequently sues the FWS over its decision in the same matter, but FWS does not include deliberative information when compiling the AR in accordance with DOJ policy, the plaintiff could petition the court to order the FWS to supplement the AR with those deliberative documents that were released under the previous FOIA request.
 - Such inadvertent release or failure to include those documents in the AR could also give the court reason to grant discovery beyond the AR, which is burdensome.

While DOJ has acknowledged that they anticipate some record challenges related to the new AR direction, they stated that they are prepared to defend those challenges. Further, there is no expectation that FOIA responses and ARs will be completely consistent, as the standards are different: FOIA's are whether the information is deliberative and foreseeable harm would result; ARs are about the information not being relevant to a court's APA review. Nevertheless, successful defense of our ARs is partially dependent on thoughtful application of Exemption 5 in our FOIA responses.

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOJ's AR direction.

Applying the Deliberative Process Privilege to Specific File Types Relevant to FWS Decisionmaking

During the review of documents where the deliberative process privilege may apply, the following should be considered during thorough document review. This review is typically conducted by the subject matter expert(s) and/or agency FOIA staff and reviewed by the FWS FOIA Officer or Regional FOIA Coordinator and SOL if documents are to be withheld.

- Categories of information and documents that should be considered for withholding in full or in part under Exemption 5's deliberative process privilege, if foreseeable harm could result from release, and a segregability analysis has been undertaken (determining whether certain portions of an otherwise privileged document can be released):
 - Draft outlines, conceptual treatments, etc.;
 - Draft inserts of language for team consideration or inclusion in policy/rule;
 - Draft versions of policies and rules (noting that some versions do not differ substantively from the public versions, or can otherwise be released)
 - Draft responses to public comments, often found within edited spreadsheets produced by regulations.gov, or other systems that sort comments into groupings of substantive vs. non-substantive;
 - Internal comments from other Service offices and regions;
 - Email content that reflects substantive suggestions and interpretations that were never adopted, or tentative analysis and discussion of options;
 - PowerPoints/webinars not shared with audiences external to the federal government;
 - Internal summaries, analyses, and comparative materials (only if a review determines that they are predecisional);
 - Email discussions about who needs to be briefed and the scheduling of such briefings, paying specific attention to any deliberative content;
 - Internal briefing documents that address pre-decisional substantive issues;
 - Decision meeting notes and summaries, score sheets, and memos to file reflecting substantive deliberation and especially participant names, position, or individual decision recommendations.
- Categories of information and documents that are typically released in full:
 - Regulations.gov materials, downloaded directly from regulations.gov (public comments and website generated spreadsheets of public comments and their attachments);
 - Meeting materials, such as agendas (but all substantive information will be considered for redaction);
 - Team email discussions and materials that address meeting agendas, timelines and tasks/assignments so long as they do not discuss specific positions on those topics.

- Transmittal emails that mention that comments are attached but do not reveal the substance of the comments. They will be released even if they mention the topic or the pages where comments are found so long as they do not reveal specific positions/comments (this typically only applies to interagency comments on draft rules coordinated by OMB);
 - Subject lines and attachment names, unless they reveal content that reflects substantive information;
 - Portions of internal agency emails that contain non-substantive communications such as general housekeeping information, transmitting attachments that are OK to release, exchanging pleasantries, and other types of similar non-substantive content;
 - PowerPoints/webinars that have been shared with non-federal audiences;
 - Internal briefing documents that address only procedural issues, such as whether to extend the comment period (though we would redact any attorney-client material);
 - Decision memoranda that reflect the final decision and rationale of the agency; and
 - Final memoranda communicated to OMB Directors.
- Categories of information and documents that may be considered for withholding in part under other exemptions that FWS offices commonly use:
 - Conference lines/passcodes (Exemption 5 as protected under the Commercial Information Privilege);
 - Personal Information - such as personal cell phone numbers, personal email accounts not used to conduct business, or detailed references to medical status or personal life (Exemption 6, Personal Privacy); and
 - Trade secrets and confidential business information, such as proprietary GIS data (Exemption 4)

Consultation/Referral Process for Other Agencies

Consistent with past practice, information originating with or of interest to other bureaus and agencies will require referral to or consultation with that other agency prior to making a final determination on the disposition of that document. This includes, but is not limited to, information such as emails and comments from other agencies, such as CEQ, DOJ, OMB, EPA, etc., as well as documents on their letterhead. Consult with the FWS FOIA Officer or your Regional FOIA Coordinator if the records you have located contain information that originated with another agency. All consultations and referrals must be reviewed and approved by the FWS FOIA Officer.

For Further Information

If you have questions or concerns regarding this guidance, please contact the Branch of Listing Policy and Support in Headquarters (Carey Galst, Parks Gilbert, and Eileen Harke), who will coordinate as appropriate with the FWS FOIA Officer and DOI FOIA SOL. If you have questions about specific FOIA matters, please direct them to your office's FOIA specialist or to the SOL attorney assigned to the FOIA matter.

From: [Galst, Carey](#)
To: Amy Brisendine; Beth Forbus; Bridget Fahey; Caitlin Snyder; Christina Kravitz; Colleen Fahey; Dana Hartley; Elbert, Daniel; Dorothy Herda; Ellen VanGelder; Shultz, Gina; Heather Bell; Holly Herod; Jason Miller; Jeff Newman; Jennifer Neely; John Swords; Kelly Hornaday; Niland, Kelly; Lisa Ellis; Nancy Green; Ron Vandervort; Andrew Cruz; Andrew Raabe; Andy DeVolder; Angela Okolie; Barry Forsythe; Ben Thatcher; Bergeson, Mitch; Brenda Montgomery; Catherine Liller; Cheryl Amran; Chris Tanner; Constantino, Maricela; Craig Aubrey; Dana Wright; Debby Crouse; Diane Bowen; Eileen Harke; Frankie Green; Gary Frazer; George Noguchi; Jaka, Jonathan; Jane Harner; Janice Engle; Janine Van Norman; Jeanette Green; Jeffrey Herod; Jennifer Servis; Jennifer Thompson; John Morse; Jonathan Phinney; Joyce Allen; Julie H Moore; Karen L Anderson; Karen Myers; Kathryn Bissell; Katie Niemi; Keith Paul; Ken Crabb; Kristy Hatch; Lee, Cecelia; Leona Laniawe; Lois Wellman; Madeline Prush; Mark Abramovitz; Mark Pavelka; martha_balislarson@fws.gov; Megan Kelhart; Megan Lang; Miller, Kayla; Moira McKernan; Nancy Golden; Natchanon Ketram; Nathan Zorich; Nic Huber; Nicolaysen, Tara; Parks Gilbert; Patrice Ashfield; Paul Comlish; Rachel London; Ren, Chun-Xue; Richard Gooch; Richard Henry; Robert Barba; Robyn Blackburn; Rosemary Burk; Rusty Griffin; Sara Pollack; Sarah Leon; Sarah Quamme; Sherry Skipper; Sonja Harris; Stephanie Nash; Steve Boateng; Steve Reagan; Sue Ellis; Teresa Fish; Trish Adams; Valerie Fellows; Victoria Foster
Subject: Fwd: Skinny Administrative Record/FOIA Guidance
Date: Thursday, September 06, 2018 1:33:55 PM
Attachments: [ENRD Memo - Administrative Record \(October 20, 2017\).pdf](#)
[Foreseeable Harm Memo final_Cafaro.pdf](#)
[Haugrud_email.pdf](#)
[20180906 FOIA and Skinny AR guidance.docx](#)

Hi All -

Please see the attached AR and FOIA guidance. Please let us know if you have any questions.

Thanks!

Carey

><> ><> ><> ><> ><> ><> ><> ><> ><> ><>

Carey Galst-Cavalcante

Chief, Branch of Listing Policy and Support, Ecological Services
U.S. Fish and Wildlife Service Headquarters
5275 Leesburg Pike MS: ES, Falls Church, VA 22041-3803
phone: 703-358-1954; fax: 703-358-1735
email: Carey_Galst@fws.gov

----- Forwarded message -----

From: **Fahey, Bridget** <bridget_fahey@fws.gov>
Date: Thu, Sep 6, 2018 at 12:37 PM
Subject: Skinny Administrative Record/FOIA Guidance
To: FWS ES Regional ARDs <fws_es_regionals_aruds@fws.gov>, FWS ES Deputy ARDs <fws_es_deputy_aruds@fws.gov>, Susan Jacobsen <Susan_Jacobsen@fws.gov>, Alisa Shull <alisa_shull@fws.gov>, Sarah Quamme <Sarah_Quamme@fws.gov>, Aaron Valenta <Aaron_Valenta@fws.gov>, Don Morgan <Don_Morgan@fws.gov>, Gina Shultz <Gina_Shultz@fws.gov>, Drew Crane <drew_crane@fws.gov>, Jeff Newman <jeff_newman@fws.gov>, Marilet Zablan <marilet_zablan@fws.gov>, Marjorie Nelson <marjorie_nelson@fws.gov>, Martin Miller <martin_miller@fws.gov>, "Long, Michael" <michael_long@fws.gov>, "Merritt, Timothy" <timothy_merritt@fws.gov>, "Aubrey, Craig" <craig_aubrey@fws.gov>, "Frazer, Gary" <gary_frazer@fws.gov>
Cc: Parks Gilbert <parks_gilbert@fws.gov>, Eileen Harke <eileen_harke@fws.gov>, Carey Galst <Carey_Galst@fws.gov>

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also

discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ - let us know if you are interested in such a webinar.

Thank you!

Bridget Fahey
Division Chief for Conservation and Classification
U.S. Fish and Wildlife Service
(703) 358-2163



U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

October 20, 2017

MEMORANDUM

To: Selected Agency Counsel

From: Jeffrey H. Wood *[Signature]*
Acting Assistant Attorney General

Re: Administrative Record Compilation in light of
In re Thomas E. Price, Ninth Cir. No. 17-71121

The Environment and Natural Resources Division (“ENRD”) wants to alert you to a petition for writ of mandamus recently filed by the Department of Justice (“DOJ”), which addresses the scope of the administrative record in Administrative Procedure Act (“APA”) record-review litigation. The administrative record compiled by the agency is the focus of judicial review. Success in record-review litigation depends on agencies producing a complete and comprehensive record. As always, administrative records certified by agencies should be forthrightly and expeditiously prepared and be complete.

The mandamus petition, *In re Thomas E. Price*, Ninth Cir. No. 17-71121, expresses DOJ’s view (as authorized by the Office of the Solicitor General) that agency deliberative documents are *not* properly considered part of the administrative record and therefore generally should not be produced as part of the record filed with the court, nor listed in a privilege log. As the *Price* petition explains, agency deliberative documents—*i.e.*, documents reflecting the agency’s predecisional deliberative process—generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making.

As litigation in the Ninth Circuit develops, ENRD intends to provide updated guidance on best practices for handling deliberative documents when producing an administrative record. For now, we want to make sure you know that the *Price* petition represents the view of the United States on this issue, and that any contrary guidance you may have received from ENRD, including the January 1999 document entitled “Guidance to the Federal Agencies in Compiling the Administrative Record,” should be disregarded.¹ This updated guidance is specifically

¹ Please note that a prior December 2008 Assistant Attorney General Memorandum regarding the 1999 document stated that the 1999 document did not dictate any binding requirement for the assembly of the administrative record and should not be read to cast doubt on DOJ’s long-advanced position that deliberative documents generally should not be included in an administrative record. To the extent the 2008 memorandum itself suggested that whether to include deliberative documents in the administrative record is a matter of agency discretion, the position of the

focused on documents that are part of the agency's deliberative process and does not address non-deliberative documents that an agency deems appropriate to include in an administrative record. Agencies should continue to follow their existing practices with regard to non-deliberative documents.

The United States' view of the scope of the administrative record is explained at pages 12–19 of the *Price* petition. To summarize, the proper scope of the administrative record in an APA action is "bounded by the proper scope of administrative review." Pet. 13. Absent a "strong showing of bad faith," administrative review is limited to an agency's stated reasons for its decisions, rather than an interrogation of the agency's subjective motives. *Id.* 13–14. But because inquiry into the agency's internal deliberations is immaterial to the purposes of record-review litigation, and would chill free and frank agency deliberation, deliberative documents are not properly considered part of the administrative record. *Id.* at 15. As such, deliberative documents generally should not be produced as part of the administrative record filed with a court, nor listed in a privilege log.

While it may be appropriate in unusual circumstances for an agency to produce deliberative materials as part of an administrative record, any decision to do so should proceed mindful that inclusion of deliberative materials is a deviation from the usual rule and may serve as a harmful precedent in other cases. Agencies should consult with DOJ attorneys to determine whether special reasons for deviating from the usual rule apply in any particular case or jurisdiction. We also suggest that agencies consider reviewing their existing regulations and guidance for consistency with the position expressed herein. Questions regarding this guidance may be directed to the Law and Policy Section of ENRD.

United States is more correctly stated in the *Price* petition: Such documents generally should not be regarded as part of the record.



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 29 2017

Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

A handwritten signature in black ink that reads "Cindy Cafaro".

I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

II. Background

The FOIA¹ generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.² Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

¹ 5 U.S.C. § 552.

² See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.³

III. Analysis

A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.⁴ Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.⁵ See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL*.
- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.
- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

³ "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See [383 DM 15](#) § 15.6.H.

⁴ See [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

⁵ All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See [383 DM 15](#) § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

CHART 1		
If	Then	And
You decide no FOIA exemption applies to any portion of a responsive record	You cannot withhold it	You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)
You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You must consult with SOL	You do not need to seek additional information from a SME (unless SOL suggests you do so)
You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	<p>After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL</p> <p>After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released)</p>
You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)

B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.⁶ The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.
- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.⁷ If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.⁸ Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

⁶ For example, [these statutes](#) have been found to be covered by Exemption 3.

⁷ For more information on Exemption 4, see [Exemption 4 in a Nutshell](#).

⁸ This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law⁹, however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.¹⁰

Exemption 2: protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

Exemption 5: protects inter-agency or intra-agency materials¹¹ that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

⁹ It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

¹⁰ Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

¹¹ If this threshold is not met, Exemption 5 cannot protect the record. See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uninformed decisionmaking, and public confusion.¹²
- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

CHART 2		
Factors to consider when Exemption 5 applies to a record	The factors lead to questions	And the answers to the questions lead to conclusions
Nature of the decision involved	Is it highly sensitive and/or controversial?	The less sensitive and/or controversial, the less likely foreseeable harm would arise
Nature of the decisionmaking process	Does it require total candor and confidentiality?	The less candor and confidentiality required, the less likely foreseeable harm would arise
Status of the decision	Has the decision been made yet?	If the decision has been made, it is less likely foreseeable harm would arise
Status of the personnel involved	Will the same agency employees, or similarly situated ones, likely be affected by disclosure?	If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise

¹² For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

CHART 2 (CONT.)		
Factors to consider when Exemption 5 applies to a record	The factors lead to questions	And the answers to the questions lead to conclusions
Potential for process impairment	Would there be an actual diminishment if employees felt inhibited by potential disclosure?	If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise
Significance of any process impairment	How strong would the chilling effect be?	If the chilling effect would be weak, it is less likely foreseeable harm would arise
Age of the information in the record	Has the sensitivity faded over time? Was the record created more than 25 years before the request was made?	If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply
Sensitivity of individual record portions	Can the sensitive materials be segregated from non-sensitive materials?	If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

Exemption 8: protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

Exemption 9: protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

IV. Conclusion

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at <https://www.doi.gov/foia/contacts> and/or contact me at 202-208-5342 or at cindy_cafaro@ios.doi.gov.

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

Appendix to Foreseeable Harm Memorandum: Overview.

This Exemption	Generally Protects this Type of Information	If this Exemption Applies then Conduct
Exemption 1	Classified national defense and foreign policy information	No foreseeable harm analysis
Exemption 2	Information related solely to the internal personnel rules and practices of an agency	Detailed foreseeable harm analysis
Exemption 3	Information protected from disclosure by another federal statute	No foreseeable harm analysis
Exemption 4	Trade secrets and commercial or financial information obtained from a person that is privileged or confidential	No foreseeable harm analysis
Exemption 5	Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)	Detailed foreseeable harm analysis
Exemption 6	Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed	Very concise foreseeable harm analysis
Exemption 7	Information compiled for law enforcement purposes, if disclosure: (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source; (E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual	Very concise foreseeable harm analysis
Exemption 8	Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision	Detailed foreseeable harm analysis
Exemption 9	Geological or geophysical information concerning wells	Detailed foreseeable harm analysis



Galst, Carey <carey_galst@fws.gov>

Fwd: Acting AAG Memorandum on Administrative Records

Gilbert, Parks <parks_gilbert@fws.gov>
To: Carey Galst <Carey_Galst@fws.gov>

Tue, Nov 7, 2017 at 7:57 AM

I'm thinking this is actually in place now, b5-ACC & DP

Parks Gilbert
ESA Litigation Specialist
Branch of Listing Policy and Support, Ecological Services
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
703/358-1758
parks_gilbert@fws.gov

----- Forwarded message -----

From: Chen, Linus <linus.chen@sol.doi.gov>
Date: Mon, Nov 6, 2017 at 2:38 PM
Subject: Fwd: Acting AAG Memorandum on Administrative Records
To: Parks Gilbert <parks_gilbert@fws.gov>

In case you didn't already get this from someone in DPW:

----- Forwarded message -----

From: Haugrud, Kevin <jack.haugrud@sol.doi.gov>
Date: Wed, Nov 1, 2017 at 4:09 PM
Subject: Acting AAG Memorandum on Administrative Records
To: SOL-ANN-ALLEMP <sol-ann-allemp@sol.doi.gov>, SOL-Immediate Office <ios@sol.doi.gov>

b5-ACC & DP

--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

3 attachments

 ENRD Memo - Administrative Record (October 20, 2017).pdf
219K

 WILDLIFE-#301120-v1-WMRS_-_Final_-Price_Mandamus_ Petition_-_Opening_Brief_(9th_ Cir_).PDF
2685K

 WILDLIFE-#301121-v1-WMRS_-_Final_-Price_Mandamus_ Petition_Reply_Brief_(9th_Cir_).PDF
190K

Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records

Purpose of this Document

To ensure consistent application of the attached Department of Justice Environment and Natural Resources Division's (DOJ) October 20, 2017, administrative record (AR) guidance, this document provides recommendations to Fish and Wildlife Service Ecological Services (FWS) staff for reviewing, redacting, and withholding deliberative information responsive to Freedom of Information Act (FOIA) requests. Specifically, we provide recommendations and considerations for when withholding records as deliberative under FOIA Exemption 5 (5 USC 552(b)(5)) may be appropriate. After identifying documents that should be considered for withholding as deliberative under FOIA Exemption 5, it is incumbent upon FWS personnel engaged in the review process to review all responsive documents, redact them as appropriate, and release any parts of documents that do not qualify for withholding, (i.e., materials that are not deliberative, or would not foreseeably harm the Agency's decision making process if they were released). Where we invoke the deliberative process privilege, FWS must consult with the Department of Interior Solicitor's Office (SOL) to confirm the propriety of invoking FOIA Exemption 5, or other FOIA exemptions.

Note that this document is not intended to be absolute in directing FWS personnel on how to treat all predecisional information in responding to a FOIA request (i.e., it is not suggesting that FWS automatically withhold all such information), nor to replace an appropriate foreseeable harm analysis. Rather, this document is intended to raise awareness of the need to process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could be subsequently included in an AR pursuant to Administrative Procedure Act (APA) litigation involving FWS decisions. While this document will be most useful for Endangered Species Act (ESA) matters, it also applies to FOIAs relating to other laws that are administered by FWS, such as the National Environmental Policy Act, Coastal Barrier Resources Act, Federal Power Act, Bald & Golden Eagle Protection Act, etc., but ESA is the primary focus.

Background

The October 20, 2017, DOJ memorandum clarifies that an AR associated with litigation on an agency decision under the APA should not include deliberative documents. Specifically, the memorandum explains that, "documents reflecting the agency's predecisional deliberative process – generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making." Courts generally review FWS's decisions under APA standards.

Implementing this policy will require a change in the way the FWS compiles ARs for court cases. Previously, it was common practice for the FWS to include deliberative documents in its ARs, even though the agency could have asserted they were deliberative process-privileged, and ARs tended to be voluminous. However, some ARs that have been prepared for programmatic rules or policies and for national consultations have generally not included deliberative documents. For example, ARs on the:

- Policy on Significant Portion of Its Range did not include many substantive emails exchanged during the development of the draft and final policies, nor did it include some drafts of the policy, intra- and inter-agency comments on the policies, and certainly attorney-client privileged materials.
- Section 7 consultation on EPA's Clean Water Act 316(b) rule, which regulates how cooling water intake structures at plants are to operate to avoid harming listed species, we withheld and listed in a privilege log draft biological opinions and reasonable and prudent alternatives, emails containing inter- and intra-agency comments on the drafts, and briefing papers.

Recently (late 2017-early 2018), DOJ has also required that we prepare more limited ARs for non-programmatic ESA cases, such as in the litigation over the GYE grizzly delisting, the Keystone XL pipeline consultation litigation, golden-cheeked warbler petition finding, coastal California gnatcatcher petition finding, Atlantic Coast Pipeline consultation, and the California WaterFix consultation.

DOJ's AR direction has an indirect impact on our FOIA program as well. Interested stakeholders often send FOIA requests for information regarding FWS's ESA decisions in advance of litigation. In past FOIA responses, FWS has often released most, if not all, documents related to its ESA final decisions without undertaking a discerning review for deliberative materials. DOJ's direction on compiling ARs reinforces that we should take great care with our FOIA responses relating to ESA decisions. While it is important to be transparent about agency decisionmaking, we also have an obligation to consider the applicability of FOIA exemptions to decisions and to protect deliberations relating to those decisions when analysis allows us to reasonably foresee harm from releasing related documents and information.

Deliberative Process Privilege under FOIA Exemption 5 and Foreseeable Harm

The deliberative process privilege, with some caveats, allows a federal agency to withhold information from public disclosure if it has not been shared outside the federal government, it is predecisional, and it is deliberative. Predecisional means it predated the decision in question, while deliberative means the document expresses recommendations on legal or policy matters. Further, in addition to a determination that the material qualifies as deliberative, we must reasonably foresee that harm would result from release of the information in order to withhold it. The DOI FOIA Appeals Office requires us to articulate the harm we reasonably foresee from the

release of a document subject to an exemption under FOIA. The office responding to the FOIA request must conduct a foreseeable harm analysis on a case-by-case basis, typically consisting of written documentation stating how many documents were withheld and why, as well as describing the foreseeable harm anticipated if they were released.

In the attached December 29, 2017, memorandum from the Department of the Interior’s Departmental FOIA Officer, addressing the “Foreseeable Harm Standard,” (DOI FOIA Memo) the foreseeable harm arising from the release of materials covered by the deliberative process privilege may include, “...injury to the decisionmaking process, a chilling effect on discussions, hasty or uninformed decisionmaking, and public confusion.” The DOI FOIA Memo includes a chart (pp. 6-7) that provides more information on how to complete a foreseeable harm analysis. For example, the release of notes from a recommendation team meeting on the classification status of a species under the ESA that identified the views of individuals could place those individuals in a negative public light or otherwise subject them to public scrutiny. That in turn could cause a chilling effect on frank conversations amongst staff and/or decisionmakers which would harm the decisionmaking process. While releasing recommendation meeting notes may not cause foreseeable harm, they (along with other documents listed later in this memo) should be carefully reviewed.

If the lead office on a FOIA determines that it should invoke the privilege and withhold documents, it needs to ensure that it has the authority to make calls on withholding and must also consult with SOL on the proposed withholding. It often makes sense not only to work with the SOL attorney assigned to review the withholding, but if a different attorney participated in or reviewed the underlying decision, to consult with that attorney, too, to receive input on withholding determinations.

Additional FOIA Exemption 5 Privileges

In addition to the deliberative process privilege, FOIA Exemption 5 includes two other privileges that FWS has traditionally considered: attorney-client communications and attorney work-product. As set out in the DOI FOIA Memo, the foreseeable harm arising from the release of materials covered by the attorney-client privilege may be that, “...the lawyer would no longer be kept fully informed by their [sic] client, resulting in unsound legal advice and advocacy.” Further, the foreseeable harm arising from releasing attorney work product may include, “...harm to the adversarial trial process by exposing the attorney’s preparation to scrutiny.” Although the DOJ Memo on ARs focused on the deliberative process privilege under Exemption 5, these two additional privileges under that exemption should be carefully considered in processing FOIA requests on FWS decisions subject to APA review. In particular, documents should be reviewed for attorney involvement or communications, including references to and repeating of attorneys’ advice in emails. For further information about these additional Exemption 5 privileges and their application, please consult the DOI FOIA Memo and your office’s FOIA specialist.

General Application of the Deliberative Process Privilege to FWS's FOIA Responses

The need for careful review in our FOIA responses arises as follows:

- As to protecting our decisions in the FOIA context: release of deliberative information could lead to the harms described above, and so we must carefully consider whether foreseeable harm could result from releasing the information.
- As to protecting our decisions in APA litigation:
 - If the FWS fails to withhold appropriately-categorized deliberative information in making a release under FOIA in these instances, the deliberative process privilege over those documents arguably has been waived by the Department.
 - If a citizen subsequently sues the FWS over its decision in the same matter, but FWS does not include deliberative information when compiling the AR in accordance with DOJ policy, the plaintiff could petition the court to order the FWS to supplement the AR with those deliberative documents that were released under the previous FOIA request.
 - Such inadvertent release or failure to include those documents in the AR could also give the court reason to grant discovery beyond the AR, which is burdensome.

While DOJ has acknowledged that they anticipate some record challenges related to the new AR direction, they stated that they are prepared to defend those challenges. Further, there is no expectation that FOIA responses and ARs will be completely consistent, as the standards are different: FOIA's are whether the information is deliberative and foreseeable harm would result; ARs are about the information not being relevant to a court's APA review. Nevertheless, successful defense of our ARs is partially dependent on thoughtful application of Exemption 5 in our FOIA responses.

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOJ's AR direction.

Applying the Deliberative Process Privilege to Specific File Types Relevant to FWS Decisionmaking

During the review of documents where the deliberative process privilege may apply, the following should be considered during thorough document review. This review is typically conducted by the subject matter expert(s) and/or agency FOIA staff and reviewed by the FWS FOIA Officer or Regional FOIA Coordinator and SOL if documents are to be withheld.

- Categories of information and documents that should be considered for withholding in full or in part under Exemption 5's deliberative process privilege, if foreseeable harm could result from release, and a segregability analysis has been undertaken (determining whether certain portions of an otherwise privileged document can be released):
 - Draft outlines, conceptual treatments, etc.;
 - Draft inserts of language for team consideration or inclusion in policy/rule;
 - Draft versions of policies and rules (noting that some versions do not differ substantively from the public versions, or can otherwise be released)
 - Draft responses to public comments, often found within edited spreadsheets produced by regulations.gov, or other systems that sort comments into groupings of substantive vs. non-substantive;
 - Internal comments from other Service offices and regions;
 - Email content that reflects substantive suggestions and interpretations that were never adopted, or tentative analysis and discussion of options;
 - PowerPoints/webinars not shared with audiences external to the federal government;
 - Internal summaries, analyses, and comparative materials (only if a review determines that they are predecisional);
 - Email discussions about who needs to be briefed and the scheduling of such briefings, paying specific attention to any deliberative content;
 - Internal briefing documents that address pre-decisional substantive issues;
 - Decision meeting notes and summaries, score sheets, and memos to file reflecting substantive deliberation and especially participant names, position, or individual decision recommendations.
- Categories of information and documents that are typically released in full:
 - Regulations.gov materials, downloaded directly from regulations.gov (public comments and website generated spreadsheets of public comments and their attachments);
 - Meeting materials, such as agendas (but all substantive information will be considered for redaction);
 - Team email discussions and materials that address meeting agendas, timelines and tasks/assignments so long as they do not discuss specific positions on those topics.

- Transmittal emails that mention that comments are attached but do not reveal the substance of the comments. They will be released even if they mention the topic or the pages where comments are found so long as they do not reveal specific positions/comments (this typically only applies to interagency comments on draft rules coordinated by OMB);
 - Subject lines and attachment names, unless they reveal content that reflects substantive information;
 - Portions of internal agency emails that contain non-substantive communications such as general housekeeping information, transmitting attachments that are OK to release, exchanging pleasantries, and other types of similar non-substantive content;
 - PowerPoints/webinars that have been shared with non-federal audiences;
 - Internal briefing documents that address only procedural issues, such as whether to extend the comment period (though we would redact any attorney-client material);
 - Decision memoranda that reflect the final decision and rationale of the agency; and
 - Final memoranda communicated to OMB Directors.
- Categories of information and documents that may be considered for withholding in part under other exemptions that FWS offices commonly use:
 - Conference lines/passcodes (Exemption 5 as protected under the Commercial Information Privilege);
 - Personal Information - such as personal cell phone numbers, personal email accounts not used to conduct business, or detailed references to medical status or personal life (Exemption 6, Personal Privacy); and
 - Trade secrets and confidential business information, such as proprietary GIS data (Exemption 4)

Consultation/Referral Process for Other Agencies

Consistent with past practice, information originating with or of interest to other bureaus and agencies will require referral to or consultation with that other agency prior to making a final determination on the disposition of that document. This includes, but is not limited to, information such as emails and comments from other agencies, such as CEQ, DOJ, OMB, EPA, etc., as well as documents on their letterhead. Consult with the FWS FOIA Officer or your Regional FOIA Coordinator if the records you have located contain information that originated with another agency. All consultations and referrals must be reviewed and approved by the FWS FOIA Officer.

For Further Information

If you have questions or concerns regarding this guidance, please contact the Branch of Listing Policy and Support in Headquarters (Carey Galst, Parks Gilbert, and Eileen Harke), who will coordinate as appropriate with the FWS FOIA Officer and DOI FOIA SOL. If you have questions about specific FOIA matters, please direct them to your office's FOIA specialist or to the SOL attorney assigned to the FOIA matter.

From: [Gilbert, Parks](#)
To: [Chen, Linus](#)
Subject: Re: Skinny Administrative Record/FOIA Guidance
Date: Thursday, September 6, 2018 2:29:55 PM

Carey and I talked and it's OK to share it with NOAA GC, but please ask them to not distribute it.

Parks Gilbert
Endangered Species Act Litigation Specialist
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
(703) 358-1758
parks_gilbert@fws.gov

On Thu, Sep 6, 2018 at 1:02 PM Chen, Linus <linus.chen@sol.doi.gov> wrote:
Dan Pollack of NOAA GC had asked what we were doing to respond to DOJ's memo.

On Thu, Sep 6, 2018 at 1:00 PM Gilbert, Parks <parks_gilbert@fws.gov> wrote:
I did sent it to Kristen and Meredith at DOJ, but I would really prefer that it otherwise stay in FWS and SOL. What did you have in mind? b5-DPP, b5-ACP

Parks Gilbert
Endangered Species Act Litigation Specialist
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
(703) 358-1758
parks_gilbert@fws.gov

On Thu, Sep 6, 2018 at 12:54 PM Chen, Linus <linus.chen@sol.doi.gov> wrote:
Can we share this outside of DOI?

On Thu, Sep 6, 2018 at 12:43 PM Gilbert, Parks <parks_gilbert@fws.gov> wrote:
Hey all, here is the long-awaited (at least on my branch's part) skinny AR/FOIA guidance. Please reach out with any questions.

Thanks,

Parks

Parks Gilbert
Endangered Species Act Litigation Specialist
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
(703) 358-1758
parks_gilbert@fws.gov

----- Forwarded message -----

From: **Fahey, Bridget** <bridget_fahey@fws.gov>
Date: Thu, Sep 6, 2018 at 12:37 PM
Subject: Skinny Administrative Record/FOIA Guidance
To: FWS ES Regional ARDs <fws_esRegional_aruds@fws.gov>, FWS ES Deputy ARDs <fws_es_deputy_aruds@fws.gov>, Susan Jacobsen <Susan_Jacobsen@fws.gov>, Alisa Shull <alisa_shull@fws.gov>, Sarah Quamme <Sarah_Quamme@fws.gov>, Aaron Valenta <Aaron_Valenta@fws.gov>, Don Morgan <Don_Morgan@fws.gov>, Gina Shultz <Gina_Shultz@fws.gov>, Drew Crane <drew_crane@fws.gov>, Jeff Newman <jeff_newman@fws.gov>, Marilet Zablan <marilet_zablan@fws.gov>, Marjorie Nelson <marjorie_nelson@fws.gov>, Martin Miller <martin_miller@fws.gov>, Long, Michael <michael_long@fws.gov>, Merritt, Timothy <timothy_merritt@fws.gov>, Aubrey, Craig <craig_aubrey@fws.gov>, Frazer, Gary <gary_frazer@fws.gov>
Cc: Parks Gilbert <parks_gilbert@fws.gov>, Eileen Harke <eileen_harke@fws.gov>, Carey Galst <Carey_Galst@fws.gov>

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ -- let us know if you are interested in such a webinar.

Thank you!

Bridget Fahey
Division Chief for Conservation and Classification
U.S. Fish and Wildlife Service
(703) 358-2163

--
Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

From: [Norman, Kate](#)
To: [Galst, Carey](#)
Subject: Fwd: Skinny Administrative Record/FOIA Guidance
Date: Thursday, September 6, 2018 5:09:51 PM
Attachments: [ENRD Memo - Administrative Record \(October 20, 2017\).pdf](#)
[Foreseeable Harm Memo final Cafaro.pdf](#)
[Haugrud email.pdf](#)
[20180906 FOIA and Skinny AR guidance.docx](#)

Hey Carey-

I was wondering if I could bend your ear on this topic if you have a second. I imagine you'd be the most savvy in the HQ office, but if I should bug someone else- feel free to point me in that direction :)

b5-DPP



Any advice would be VERY welcome -just want to be sure I'm not asking our records manager to go down the wrong path. Happy to get on the phone if that's best. I'm out next week, but around tomorrow or after the 17th.

Thanks!

K

----- Forwarded message -----

From: **Nelson, Marjorie** <marjorie_nelson@fws.gov>
Date: Thu, Sep 6, 2018 at 11:08 AM
Subject: Fwd: Skinny Administrative Record/FOIA Guidance
To: Kate Norman <Kate_Norman@fws.gov>, Jennifer Sturdivant <jennifer_sturdivant@fws.gov>

I haven't read this nor do I know if this is being covered in the ES chief call now.

Marjorie Nelson
Chief, Division of Ecological Services
Mountain-Prairie Region
U.S. Fish and Wildlife Service
303-236-4258 direct
720-582-3524 cell

----- Forwarded message -----

From: **Fahey, Bridget** <bridget_fahey@fws.gov>
Date: Thu, Sep 6, 2018 at 10:37 AM
Subject: Skinny Administrative Record/FOIA Guidance
To: FWS ES Regional ARDs <fws_es_regional_ards@fws.gov>, FWS ES Deputy ARDs <fws_es_deputy_ards@fws.gov>, Susan Jacobsen <Susan_Jacobsen@fws.gov>, Alisa Shull <alisa_shull@fws.gov>, Sarah Quamme <Sarah_Quamme@fws.gov>, Aaron Valenta <Aaron_Valenta@fws.gov>, Don Morgan <Don_Morgan@fws.gov>, Gina Shultz

<Gina_Shultz@fws.gov>, Drew Crane <drew_crane@fws.gov>, Jeff Newman <jeff_newman@fws.gov>, Marilet Zablan <marilet_zablan@fws.gov>, Marjorie Nelson <marjorie_nelson@fws.gov>, Martin Miller <martin_miller@fws.gov>, "Long, Michael" <michael_long@fws.gov>, "Merritt, Timothy" <timothy_merritt@fws.gov>, "Aubrey, Craig" <craig_aubrey@fws.gov>, "Frazer, Gary" <gary_frazer@fws.gov>
Cc: Parks Gilbert <parks_gilbert@fws.gov>, Eileen Harke <eileen_harke@fws.gov>, Carey Galst <Carey_Galst@fws.gov>

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ - let us know if you are interested in such a webinar.

Thank you!

Bridget Fahey
Division Chief for Conservation and Classification
U.S. Fish and Wildlife Service
(703) 358-2163

--

Kate Norman
Decision Support Branch Chief, Ecological Services
U.S. Fish and Wildlife Service, Mountain-Prairie Regional Office
134 Union Blvd
Lakewood, CO 80228
Office: 303-236-4214
kate_norman@fws.gov

If you have a request, please visit our [SharePoint site](#). If you'd like to provide feedback on a member of the Decision Support Team, you can use our anonymous [Google Form](#).



U.S. Department of Justice

Environment and Natural Resources Division

Assistant Attorney General
950 Pennsylvania Avenue, N.W.
Washington, DC 20530-0001

Telephone (202) 514-2701
Facsimile (202) 514-0557

October 20, 2017

MEMORANDUM

To: Selected Agency Counsel

From: Jeffrey H. Wood *[Signature]*
Acting Assistant Attorney General

Re: Administrative Record Compilation in light of
In re Thomas E. Price, Ninth Cir. No. 17-71121

The Environment and Natural Resources Division (“ENRD”) wants to alert you to a petition for writ of mandamus recently filed by the Department of Justice (“DOJ”), which addresses the scope of the administrative record in Administrative Procedure Act (“APA”) record-review litigation. The administrative record compiled by the agency is the focus of judicial review. Success in record-review litigation depends on agencies producing a complete and comprehensive record. As always, administrative records certified by agencies should be forthrightly and expeditiously prepared and be complete.

The mandamus petition, *In re Thomas E. Price*, Ninth Cir. No. 17-71121, expresses DOJ’s view (as authorized by the Office of the Solicitor General) that agency deliberative documents are *not* properly considered part of the administrative record and therefore generally should not be produced as part of the record filed with the court, nor listed in a privilege log. As the *Price* petition explains, agency deliberative documents—*i.e.*, documents reflecting the agency’s predecisional deliberative process—generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making.

As litigation in the Ninth Circuit develops, ENRD intends to provide updated guidance on best practices for handling deliberative documents when producing an administrative record. For now, we want to make sure you know that the *Price* petition represents the view of the United States on this issue, and that any contrary guidance you may have received from ENRD, including the January 1999 document entitled “Guidance to the Federal Agencies in Compiling the Administrative Record,” should be disregarded.¹ This updated guidance is specifically

¹ Please note that a prior December 2008 Assistant Attorney General Memorandum regarding the 1999 document stated that the 1999 document did not dictate any binding requirement for the assembly of the administrative record and should not be read to cast doubt on DOJ’s long-advanced position that deliberative documents generally should not be included in an administrative record. To the extent the 2008 memorandum itself suggested that whether to include deliberative documents in the administrative record is a matter of agency discretion, the position of the

focused on documents that are part of the agency's deliberative process and does not address non-deliberative documents that an agency deems appropriate to include in an administrative record. Agencies should continue to follow their existing practices with regard to non-deliberative documents.

The United States' view of the scope of the administrative record is explained at pages 12–19 of the *Price* petition. To summarize, the proper scope of the administrative record in an APA action is "bounded by the proper scope of administrative review." Pet. 13. Absent a "strong showing of bad faith," administrative review is limited to an agency's stated reasons for its decisions, rather than an interrogation of the agency's subjective motives. *Id.* 13–14. But because inquiry into the agency's internal deliberations is immaterial to the purposes of record-review litigation, and would chill free and frank agency deliberation, deliberative documents are not properly considered part of the administrative record. *Id.* at 15. As such, deliberative documents generally should not be produced as part of the administrative record filed with a court, nor listed in a privilege log.

While it may be appropriate in unusual circumstances for an agency to produce deliberative materials as part of an administrative record, any decision to do so should proceed mindful that inclusion of deliberative materials is a deviation from the usual rule and may serve as a harmful precedent in other cases. Agencies should consult with DOJ attorneys to determine whether special reasons for deviating from the usual rule apply in any particular case or jurisdiction. We also suggest that agencies consider reviewing their existing regulations and guidance for consistency with the position expressed herein. Questions regarding this guidance may be directed to the Law and Policy Section of ENRD.

United States is more correctly stated in the *Price* petition: Such documents generally should not be regarded as part of the record.



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

DEC 29 2017

Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

A handwritten signature in black ink that reads "Cindy Cafaro".

I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

II. Background

The FOIA¹ generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.² Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

¹ 5 U.S.C. § 552.

² See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.³

III. Analysis

A. When Do You Consult with SOL and/or Seek Additional Information from a SME?

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.⁴ Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.⁵ See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL*.
- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.
- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

³ "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See [383 DM 15](#) § 15.6.H.

⁴ See [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

⁵ All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See [383 DM 15](#) § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

CHART 1		
If	Then	And
You decide no FOIA exemption applies to any portion of a responsive record	You cannot withhold it	You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)
You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You must consult with SOL	You do not need to seek additional information from a SME (unless SOL suggests you do so)
You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	<p>After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL</p> <p>After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released)</p>
You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)	You should seek additional information from a SME	You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)

B. What Type of Foreseeable Harm Analysis is Needed?

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.⁶ The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.
- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.⁷ If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.⁸ Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

⁶ For example, [these statutes](#) have been found to be covered by Exemption 3.

⁷ For more information on Exemption 4, see [Exemption 4 in a Nutshell](#).

⁸ This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law⁹, however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.¹⁰

Exemption 2: protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

Exemption 5: protects inter-agency or intra-agency materials¹¹ that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

⁹ It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

¹⁰ Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

¹¹ If this threshold is not met, Exemption 5 cannot protect the record. See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uninformed decisionmaking, and public confusion.¹²
- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

CHART 2		
Factors to consider when Exemption 5 applies to a record	The factors lead to questions	And the answers to the questions lead to conclusions
Nature of the decision involved	Is it highly sensitive and/or controversial?	The less sensitive and/or controversial, the less likely foreseeable harm would arise
Nature of the decisionmaking process	Does it require total candor and confidentiality?	The less candor and confidentiality required, the less likely foreseeable harm would arise
Status of the decision	Has the decision been made yet?	If the decision has been made, it is less likely foreseeable harm would arise
Status of the personnel involved	Will the same agency employees, or similarly situated ones, likely be affected by disclosure?	If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise

¹² For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

CHART 2 (CONT.)		
Factors to consider when Exemption 5 applies to a record	The factors lead to questions	And the answers to the questions lead to conclusions
Potential for process impairment	Would there be an actual diminishment if employees felt inhibited by potential disclosure?	If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise
Significance of any process impairment	How strong would the chilling effect be?	If the chilling effect would be weak, it is less likely foreseeable harm would arise
Age of the information in the record	Has the sensitivity faded over time? Was the record created more than 25 years before the request was made?	If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply
Sensitivity of individual record portions	Can the sensitive materials be segregated from non-sensitive materials?	If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

Exemption 8: protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

Exemption 9: protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

IV. Conclusion

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at <https://www.doi.gov/foia/contacts> and/or contact me at 202-208-5342 or at cindy_cafaro@ios.doi.gov.

ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

Appendix to Foreseeable Harm Memorandum: Overview.

This Exemption	Generally Protects this Type of Information	If this Exemption Applies then Conduct
Exemption 1	Classified national defense and foreign policy information	No foreseeable harm analysis
Exemption 2	Information related solely to the internal personnel rules and practices of an agency	Detailed foreseeable harm analysis
Exemption 3	Information protected from disclosure by another federal statute	No foreseeable harm analysis
Exemption 4	Trade secrets and commercial or financial information obtained from a person that is privileged or confidential	No foreseeable harm analysis
Exemption 5	Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)	Detailed foreseeable harm analysis
Exemption 6	Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed	Very concise foreseeable harm analysis
Exemption 7	Information compiled for law enforcement purposes, if disclosure: (A) could reasonably be expected to interfere with enforcement proceedings; (B) would deprive a person of a right to a fair trial or an impartial adjudication; (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (D) could reasonably be expected to disclose the identity of a confidential source; (E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or (F) could reasonably be expected to endanger the life or physical safety of any individual	Very concise foreseeable harm analysis
Exemption 8	Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision	Detailed foreseeable harm analysis
Exemption 9	Geological or geophysical information concerning wells	Detailed foreseeable harm analysis



Galst, Carey <carey_galst@fws.gov>

Fwd: Acting AAG Memorandum on Administrative Records

Gilbert, Parks <parks_gilbert@fws.gov>
To: Carey Galst <Carey_Galst@fws.gov>

Tue, Nov 7, 2017 at 7:57 AM

I'm thinking this is actually in place now, b5-ACC & DP

Parks Gilbert
ESA Litigation Specialist
Branch of Listing Policy and Support, Ecological Services
U.S. Fish and Wildlife Service
5275 Leesburg Pike, MS:ES
Falls Church, VA 22041
703/358-1758
parks_gilbert@fws.gov

----- Forwarded message -----

From: Chen, Linus <linus.chen@sol.doi.gov>
Date: Mon, Nov 6, 2017 at 2:38 PM
Subject: Fwd: Acting AAG Memorandum on Administrative Records
To: Parks Gilbert <parks_gilbert@fws.gov>

In case you didn't already get this from someone in DPW:

----- Forwarded message -----

From: Haugrud, Kevin <jack.haugrud@sol.doi.gov>
Date: Wed, Nov 1, 2017 at 4:09 PM
Subject: Acting AAG Memorandum on Administrative Records
To: SOL-ANN-ALLEMP <sol-ann-allemp@sol.doi.gov>, SOL-Immediate Office <ios@sol.doi.gov>

b5-ACC & DP

--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

3 attachments

 ENRD Memo - Administrative Record (October 20, 2017).pdf
219K

 WILDLIFE-#301120-v1-WMRS_-_Final_-Price_Mandamus_ Petition_-_Opening_Brief_(9th_ Cir_).PDF
2685K

 WILDLIFE-#301121-v1-WMRS_-_Final_-Price_Mandamus_ Petition_Reply_Brief_(9th_Cir_).PDF
190K

Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records

Purpose of this Document

To ensure consistent application of the attached Department of Justice Environment and Natural Resources Division's (DOJ) October 20, 2017, administrative record (AR) guidance, this document provides recommendations to Fish and Wildlife Service Ecological Services (FWS) staff for reviewing, redacting, and withholding deliberative information responsive to Freedom of Information Act (FOIA) requests. Specifically, we provide recommendations and considerations for when withholding records as deliberative under FOIA Exemption 5 (5 USC 552(b)(5)) may be appropriate. After identifying documents that should be considered for withholding as deliberative under FOIA Exemption 5, it is incumbent upon FWS personnel engaged in the review process to review all responsive documents, redact them as appropriate, and release any parts of documents that do not qualify for withholding, (i.e., materials that are not deliberative, or would not foreseeably harm the Agency's decision making process if they were released). Where we invoke the deliberative process privilege, FWS must consult with the Department of Interior Solicitor's Office (SOL) to confirm the propriety of invoking FOIA Exemption 5, or other FOIA exemptions.

Note that this document is not intended to be absolute in directing FWS personnel on how to treat all predecisional information in responding to a FOIA request (i.e., it is not suggesting that FWS automatically withhold all such information), nor to replace an appropriate foreseeable harm analysis. Rather, this document is intended to raise awareness of the need to process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could be subsequently included in an AR pursuant to Administrative Procedure Act (APA) litigation involving FWS decisions. While this document will be most useful for Endangered Species Act (ESA) matters, it also applies to FOIAs relating to other laws that are administered by FWS, such as the National Environmental Policy Act, Coastal Barrier Resources Act, Federal Power Act, Bald & Golden Eagle Protection Act, etc., but ESA is the primary focus.

Background

The October 20, 2017, DOJ memorandum clarifies that an AR associated with litigation on an agency decision under the APA should not include deliberative documents. Specifically, the memorandum explains that, "documents reflecting the agency's predecisional deliberative process – generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making." Courts generally review FWS's decisions under APA standards.

Implementing this policy will require a change in the way the FWS compiles ARs for court cases. Previously, it was common practice for the FWS to include deliberative documents in its ARs, even though the agency could have asserted they were deliberative process-privileged, and ARs tended to be voluminous. However, some ARs that have been prepared for programmatic rules or policies and for national consultations have generally not included deliberative documents. For example, ARs on the:

- Policy on Significant Portion of Its Range did not include many substantive emails exchanged during the development of the draft and final policies, nor did it include some drafts of the policy, intra- and inter-agency comments on the policies, and certainly attorney-client privileged materials.
- Section 7 consultation on EPA's Clean Water Act 316(b) rule, which regulates how cooling water intake structures at plants are to operate to avoid harming listed species, we withheld and listed in a privilege log draft biological opinions and reasonable and prudent alternatives, emails containing inter- and intra-agency comments on the drafts, and briefing papers.

Recently (late 2017-early 2018), DOJ has also required that we prepare more limited ARs for non-programmatic ESA cases, such as in the litigation over the GYE grizzly delisting, the Keystone XL pipeline consultation litigation, golden-cheeked warbler petition finding, coastal California gnatcatcher petition finding, Atlantic Coast Pipeline consultation, and the California WaterFix consultation.

DOJ's AR direction has an indirect impact on our FOIA program as well. Interested stakeholders often send FOIA requests for information regarding FWS's ESA decisions in advance of litigation. In past FOIA responses, FWS has often released most, if not all, documents related to its ESA final decisions without undertaking a discerning review for deliberative materials. DOJ's direction on compiling ARs reinforces that we should take great care with our FOIA responses relating to ESA decisions. While it is important to be transparent about agency decisionmaking, we also have an obligation to consider the applicability of FOIA exemptions to decisions and to protect deliberations relating to those decisions when analysis allows us to reasonably foresee harm from releasing related documents and information.

Deliberative Process Privilege under FOIA Exemption 5 and Foreseeable Harm

The deliberative process privilege, with some caveats, allows a federal agency to withhold information from public disclosure if it has not been shared outside the federal government, it is predecisional, and it is deliberative. Predecisional means it predated the decision in question, while deliberative means the document expresses recommendations on legal or policy matters. Further, in addition to a determination that the material qualifies as deliberative, we must reasonably foresee that harm would result from release of the information in order to withhold it. The DOI FOIA Appeals Office requires us to articulate the harm we reasonably foresee from the

release of a document subject to an exemption under FOIA. The office responding to the FOIA request must conduct a foreseeable harm analysis on a case-by-case basis, typically consisting of written documentation stating how many documents were withheld and why, as well as describing the foreseeable harm anticipated if they were released.

In the attached December 29, 2017, memorandum from the Department of the Interior’s Departmental FOIA Officer, addressing the “Foreseeable Harm Standard,” (DOI FOIA Memo) the foreseeable harm arising from the release of materials covered by the deliberative process privilege may include, “...injury to the decisionmaking process, a chilling effect on discussions, hasty or uninformed decisionmaking, and public confusion.” The DOI FOIA Memo includes a chart (pp. 6-7) that provides more information on how to complete a foreseeable harm analysis. For example, the release of notes from a recommendation team meeting on the classification status of a species under the ESA that identified the views of individuals could place those individuals in a negative public light or otherwise subject them to public scrutiny. That in turn could cause a chilling effect on frank conversations amongst staff and/or decisionmakers which would harm the decisionmaking process. While releasing recommendation meeting notes may not cause foreseeable harm, they (along with other documents listed later in this memo) should be carefully reviewed.

If the lead office on a FOIA determines that it should invoke the privilege and withhold documents, it needs to ensure that it has the authority to make calls on withholding and must also consult with SOL on the proposed withholding. It often makes sense not only to work with the SOL attorney assigned to review the withholding, but if a different attorney participated in or reviewed the underlying decision, to consult with that attorney, too, to receive input on withholding determinations.

Additional FOIA Exemption 5 Privileges

In addition to the deliberative process privilege, FOIA Exemption 5 includes two other privileges that FWS has traditionally considered: attorney-client communications and attorney work-product. As set out in the DOI FOIA Memo, the foreseeable harm arising from the release of materials covered by the attorney-client privilege may be that, “...the lawyer would no longer be kept fully informed by their [sic] client, resulting in unsound legal advice and advocacy.” Further, the foreseeable harm arising from releasing attorney work product may include, “...harm to the adversarial trial process by exposing the attorney’s preparation to scrutiny.” Although the DOJ Memo on ARs focused on the deliberative process privilege under Exemption 5, these two additional privileges under that exemption should be carefully considered in processing FOIA requests on FWS decisions subject to APA review. In particular, documents should be reviewed for attorney involvement or communications, including references to and repeating of attorneys’ advice in emails. For further information about these additional Exemption 5 privileges and their application, please consult the DOI FOIA Memo and your office’s FOIA specialist.

General Application of the Deliberative Process Privilege to FWS's FOIA Responses

The need for careful review in our FOIA responses arises as follows:

- As to protecting our decisions in the FOIA context: release of deliberative information could lead to the harms described above, and so we must carefully consider whether foreseeable harm could result from releasing the information.
- As to protecting our decisions in APA litigation:
 - If the FWS fails to withhold appropriately-categorized deliberative information in making a release under FOIA in these instances, the deliberative process privilege over those documents arguably has been waived by the Department.
 - If a citizen subsequently sues the FWS over its decision in the same matter, but FWS does not include deliberative information when compiling the AR in accordance with DOJ policy, the plaintiff could petition the court to order the FWS to supplement the AR with those deliberative documents that were released under the previous FOIA request.
 - Such inadvertent release or failure to include those documents in the AR could also give the court reason to grant discovery beyond the AR, which is burdensome.

While DOJ has acknowledged that they anticipate some record challenges related to the new AR direction, they stated that they are prepared to defend those challenges. Further, there is no expectation that FOIA responses and ARs will be completely consistent, as the standards are different: FOIA's are whether the information is deliberative and foreseeable harm would result; ARs are about the information not being relevant to a court's APA review. Nevertheless, successful defense of our ARs is partially dependent on thoughtful application of Exemption 5 in our FOIA responses.

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOJ's AR direction.

Applying the Deliberative Process Privilege to Specific File Types Relevant to FWS Decisionmaking

During the review of documents where the deliberative process privilege may apply, the following should be considered during thorough document review. This review is typically conducted by the subject matter expert(s) and/or agency FOIA staff and reviewed by the FWS FOIA Officer or Regional FOIA Coordinator and SOL if documents are to be withheld.

- Categories of information and documents that should be considered for withholding in full or in part under Exemption 5's deliberative process privilege, if foreseeable harm could result from release, and a segregability analysis has been undertaken (determining whether certain portions of an otherwise privileged document can be released):
 - Draft outlines, conceptual treatments, etc.;
 - Draft inserts of language for team consideration or inclusion in policy/rule;
 - Draft versions of policies and rules (noting that some versions do not differ substantively from the public versions, or can otherwise be released)
 - Draft responses to public comments, often found within edited spreadsheets produced by regulations.gov, or other systems that sort comments into groupings of substantive vs. non-substantive;
 - Internal comments from other Service offices and regions;
 - Email content that reflects substantive suggestions and interpretations that were never adopted, or tentative analysis and discussion of options;
 - PowerPoints/webinars not shared with audiences external to the federal government;
 - Internal summaries, analyses, and comparative materials (only if a review determines that they are predecisional);
 - Email discussions about who needs to be briefed and the scheduling of such briefings, paying specific attention to any deliberative content;
 - Internal briefing documents that address pre-decisional substantive issues;
 - Decision meeting notes and summaries, score sheets, and memos to file reflecting substantive deliberation and especially participant names, position, or individual decision recommendations.
- Categories of information and documents that are typically released in full:
 - Regulations.gov materials, downloaded directly from regulations.gov (public comments and website generated spreadsheets of public comments and their attachments);
 - Meeting materials, such as agendas (but all substantive information will be considered for redaction);
 - Team email discussions and materials that address meeting agendas, timelines and tasks/assignments so long as they do not discuss specific positions on those topics.

- Transmittal emails that mention that comments are attached but do not reveal the substance of the comments. They will be released even if they mention the topic or the pages where comments are found so long as they do not reveal specific positions/comments (this typically only applies to interagency comments on draft rules coordinated by OMB);
 - Subject lines and attachment names, unless they reveal content that reflects substantive information;
 - Portions of internal agency emails that contain non-substantive communications such as general housekeeping information, transmitting attachments that are OK to release, exchanging pleasantries, and other types of similar non-substantive content;
 - PowerPoints/webinars that have been shared with non-federal audiences;
 - Internal briefing documents that address only procedural issues, such as whether to extend the comment period (though we would redact any attorney-client material);
 - Decision memoranda that reflect the final decision and rationale of the agency; and
 - Final memoranda communicated to OMB Directors.
- Categories of information and documents that may be considered for withholding in part under other exemptions that FWS offices commonly use:
 - Conference lines/passcodes (Exemption 5 as protected under the Commercial Information Privilege);
 - Personal Information - such as personal cell phone numbers, personal email accounts not used to conduct business, or detailed references to medical status or personal life (Exemption 6, Personal Privacy); and
 - Trade secrets and confidential business information, such as proprietary GIS data (Exemption 4)

Consultation/Referral Process for Other Agencies

Consistent with past practice, information originating with or of interest to other bureaus and agencies will require referral to or consultation with that other agency prior to making a final determination on the disposition of that document. This includes, but is not limited to, information such as emails and comments from other agencies, such as CEQ, DOJ, OMB, EPA, etc., as well as documents on their letterhead. Consult with the FWS FOIA Officer or your Regional FOIA Coordinator if the records you have located contain information that originated with another agency. All consultations and referrals must be reviewed and approved by the FWS FOIA Officer.

For Further Information

If you have questions or concerns regarding this guidance, please contact the Branch of Listing Policy and Support in Headquarters (Carey Galst, Parks Gilbert, and Eileen Harke), who will coordinate as appropriate with the FWS FOIA Officer and DOI FOIA SOL. If you have questions about specific FOIA matters, please direct them to your office's FOIA specialist or to the SOL attorney assigned to the FOIA matter.

From: [Norman, Kate](#)
To: [Gilbert, Parks](#)
Subject: Fwd: Skinny Administrative Record/FOIA Guidance
Date: Thursday, September 6, 2018 5:19:17 PM

Hey Parks-

I'm feeling a little dense right now and would appreciate some guidance on this FOIA/Skinny Record email that was sent out today. Could I bend your ear tomorrow morning? I'll try to find a spot on your calendar and shoot you an invite.

Thanks,
K

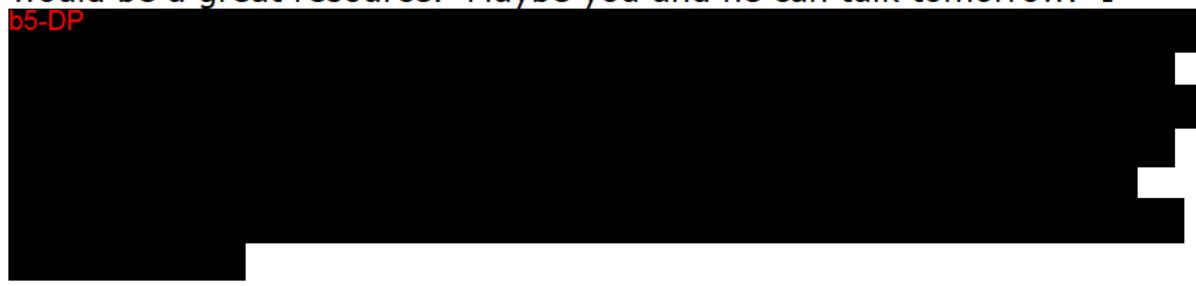
----- Forwarded message -----

From: **Galst, Carey** <carey_galst@fws.gov>
Date: Thu, Sep 6, 2018 at 3:14 PM
Subject: Re: Skinny Administrative Record/FOIA Guidance
To: Norman, Kate <kate_norman@fws.gov>, Carey Gilbert <parks_gilbert@fws.gov>

Hey Kate -

I am getting ready to head out today and off tomorrow...but Parks Gilbert is acting for me tomorrow and he helped to work on the guidance - so he would be a great resource. Maybe you and he can talk tomorrow. I

b5-DP



If you and Parks don't get a chance to talk or if you want to chat further please let me know!

Thanks,
Carey

><> ><> ><> ><> ><> ><> ><> ><> ><>

Carey Galst-Cavalcante

Chief, Branch of Listing Policy and Support, Ecological Services
U.S. Fish and Wildlife Service Headquarters
5275 Leesburg Pike MS: ES, Falls Church, VA 22041-3803
phone: 703-358-1954; fax: 703-358-1735
email: Carey_Galst@fws.gov

On Thu, Sep 6, 2018 at 5:09 PM, Norman, Kate <kate_norman@fws.gov> wrote:

Hey Carey-

I was wondering if I could bend your ear on this topic if you have a second. I imagine you'd be the most savvy in the HQ office, but if I should bug someone else- feel free to point me in

that direction :)

b5-DPP



Any advice would be VERY welcome -just want to be sure I'm not asking our records manager to go down the wrong path. Happy to get on the phone if that's best. I'm out next week, but around tomorrow or after the 17th.

Thanks!

K

----- Forwarded message -----

From: Nelson, Marjorie <marjorie_nelson@fws.gov>
Date: Thu, Sep 6, 2018 at 11:08 AM
Subject: Fwd: Skinny Administrative Record/FOIA Guidance
To: Kate Norman <Kate_Norman@fws.gov>, Jennifer Sturdivant <jennifer_sturdivant@fws.gov>

I haven't read this nor do I know if this is being covered in the ES chief call now.

Marjorie Nelson
Chief, Division of Ecological Services
Mountain-Prairie Region
U.S. Fish and Wildlife Service
303-236-4258 direct
720-582-3524 cell

----- Forwarded message -----

From: Fahey, Bridget <bridget_fahey@fws.gov>
Date: Thu, Sep 6, 2018 at 10:37 AM
Subject: Skinny Administrative Record/FOIA Guidance
To: FWS ES Regional ARDs <fws_esRegional_ards@fws.gov>, FWS ES Deputy ARDs <fws_esDeputy_ards@fws.gov>, Susan Jacobsen <Susan_Jacobsen@fws.gov>, Alisa Shull <alisa_shull@fws.gov>, Sarah Quamme <Sarah_Qquamme@fws.gov>, Aaron Valenta <Aaron_Valenta@fws.gov>, Don Morgan <Don_Morgan@fws.gov>, Gina Shultz <Gina_Shultz@fws.gov>, Drew Crane <drew_crane@fws.gov>, Jeff Newman <jeff_newman@fws.gov>, Marilet Zablan <marilet_zablan@fws.gov>, Marjorie Nelson <marjorie_nelson@fws.gov>, Martin Miller <martin_miller@fws.gov>, "Long, Michael" <michael_long@fws.gov>, "Merritt, Timothy" <timothy_merritt@fws.gov>, "Aubrey, Craig" <craig_aubrey@fws.gov>, "Frazer, Gary" <gary_frazer@fws.gov>
Cc: Parks Gilbert <parks_gilbert@fws.gov>, Eileen Harke <eileen_harke@fws.gov>, Carey Galst <Carey_Galst@fws.gov>

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so

that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ -- let us know if you are interested in such a webinar.

Thank you!

Bridget Fahey
Division Chief for Conservation and Classification
U.S. Fish and Wildlife Service
(703) 358-2163

--

Kate Norman
Decision Support Branch Chief, Ecological Services
U.S. Fish and Wildlife Service, Mountain-Prairie Regional Office
134 Union Blvd
Lakewood, CO 80228
Office: 303-236-4214
kate_norman@fws.gov

If you have a request, please visit our [SharePoint site](#). If you'd like to provide feedback on a member of the Decision Support Team, you can use our anonymous [Google Form](#).

--

Kate Norman
Decision Support Branch Chief, Ecological Services
U.S. Fish and Wildlife Service, Mountain-Prairie Regional Office
134 Union Blvd
Lakewood, CO 80228
Office: 303-236-4214
kate_norman@fws.gov

If you have a request, please visit our [SharePoint site](#). If you'd like to provide feedback on a member of the Decision Support Team, you can use our anonymous [Google Form](#).

From: [Harke, Eileen](#)
To: [Carrie Hyde-Michaels](#)
Cc: [Carey Galst](#)
Subject: Fwd: Skinny Administrative Record/FOIA Guidance
Date: Friday, September 7, 2018 11:46:05 AM
Attachments: [ENRD Memo - Administrative Record \(October 20, 2017\).pdf](#)
[Foreseeable Harm Memo final_Cafaro.pdf](#)
[Haugrud_email.pdf](#)
[20180906_FOIA and Skinny AR guidance.docx](#)

Remember this that you and Larry helped us with many months ago? Our leadership sent the Skinny AR guidance out yesterday and we are hoping it can also be sent out to FOIA folks as well. Any chance you can pass this along and/or include in the next FOIA Coordinator's call?

Thanks!

~~~~~

Eileen Harke, CRM and ERM<sup>M</sup>  
Government Information Specialist  
Branch of Listing Policy and Support, Division of Conservation and Classification  
5275 Leesburg Pike  
Falls Church, VA 22041-3803  
[eileen\\_harke@fws.gov](mailto:eileen_harke@fws.gov)  
703-358-2096

----- Forwarded message -----

From: **Fahey, Bridget** <[bridget\\_fahey@fws.gov](mailto:bridget_fahey@fws.gov)>  
Date: Thu, Sep 6, 2018 at 9:37 AM  
Subject: Skinny Administrative Record/FOIA Guidance  
To: FWS ES Regional ARDs <[fws\\_es\\_regionals@fws.gov](mailto:fws_es_regionals@fws.gov)>, FWS ES Deputy ARDs <[fws\\_es\\_deputy\\_aruds@fws.gov](mailto:fws_es_deputy_aruds@fws.gov)>, Susan Jacobsen <[Susan\\_Jacobsen@fws.gov](mailto:Susan_Jacobsen@fws.gov)>, Alisa Shull <[alisa\\_shull@fws.gov](mailto:alisa_shull@fws.gov)>, Sarah Quamme <[Sarah\\_Quamme@fws.gov](mailto:Sarah_Quamme@fws.gov)>, Aaron Valenta <[Aaron\\_Valenta@fws.gov](mailto:Aaron_Valenta@fws.gov)>, Don Morgan <[Don\\_Morgan@fws.gov](mailto:Don_Morgan@fws.gov)>, Gina Shultz <[Gina\\_Shultz@fws.gov](mailto:Gina_Shultz@fws.gov)>, Drew Crane <[drew\\_crane@fws.gov](mailto:drew_crane@fws.gov)>, Jeff Newman <[jeff\\_newman@fws.gov](mailto:jeff_newman@fws.gov)>, Marilet Zablan <[marilet\\_zablan@fws.gov](mailto:marilet_zablan@fws.gov)>, Marjorie Nelson <[marjorie\\_nelson@fws.gov](mailto:marjorie_nelson@fws.gov)>, Martin Miller <[martin\\_miller@fws.gov](mailto:martin_miller@fws.gov)>, "Long, Michael" <[michael\\_long@fws.gov](mailto:michael_long@fws.gov)>, "Merritt, Timothy" <[timothy\\_merritt@fws.gov](mailto:timothy_merritt@fws.gov)>, "Aubrey, Craig" <[craig\\_aubrey@fws.gov](mailto:craig_aubrey@fws.gov)>, "Frazer, Gary" <[gary\\_frazer@fws.gov](mailto:gary_frazer@fws.gov)>  
Cc: Parks Gilbert <[parks\\_gilbert@fws.gov](mailto:parks_gilbert@fws.gov)>, Eileen Harke <[eileen\\_harke@fws.gov](mailto:eileen_harke@fws.gov)>, Carey Galst <[Carey\\_Galst@fws.gov](mailto:Carey_Galst@fws.gov)>

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ - let us know if you are interested in such a webinar.

Thank you!

**Bridget Fahey**  
**Division Chief for Conservation and Classification**  
**U.S. Fish and Wildlife Service**  
**(703) 358-2163**



**U.S. Department of Justice**

Environment and Natural Resources Division

---

Assistant Attorney General  
950 Pennsylvania Avenue, N.W.  
Washington, DC 20530-0001

Telephone (202) 514-2701  
Facsimile (202) 514-0557

October 20, 2017

**MEMORANDUM**

To: Selected Agency Counsel

From: Jeffrey H. Wood *[Signature]*  
Acting Assistant Attorney General

Re: Administrative Record Compilation in light of  
*In re Thomas E. Price*, Ninth Cir. No. 17-71121

The Environment and Natural Resources Division (“ENRD”) wants to alert you to a petition for writ of mandamus recently filed by the Department of Justice (“DOJ”), which addresses the scope of the administrative record in Administrative Procedure Act (“APA”) record-review litigation. The administrative record compiled by the agency is the focus of judicial review. Success in record-review litigation depends on agencies producing a complete and comprehensive record. As always, administrative records certified by agencies should be forthrightly and expeditiously prepared and be complete.

The mandamus petition, *In re Thomas E. Price*, Ninth Cir. No. 17-71121, expresses DOJ’s view (as authorized by the Office of the Solicitor General) that agency deliberative documents are *not* properly considered part of the administrative record and therefore generally should not be produced as part of the record filed with the court, nor listed in a privilege log. As the *Price* petition explains, agency deliberative documents—*i.e.*, documents reflecting the agency’s predecisional deliberative process—generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making.

As litigation in the Ninth Circuit develops, ENRD intends to provide updated guidance on best practices for handling deliberative documents when producing an administrative record. For now, we want to make sure you know that the *Price* petition represents the view of the United States on this issue, and that any contrary guidance you may have received from ENRD, including the January 1999 document entitled “Guidance to the Federal Agencies in Compiling the Administrative Record,” should be disregarded.<sup>1</sup> This updated guidance is specifically

---

<sup>1</sup> Please note that a prior December 2008 Assistant Attorney General Memorandum regarding the 1999 document stated that the 1999 document did not dictate any binding requirement for the assembly of the administrative record and should not be read to cast doubt on DOJ’s long-advanced position that deliberative documents generally should not be included in an administrative record. To the extent the 2008 memorandum itself suggested that whether to include deliberative documents in the administrative record is a matter of agency discretion, the position of the

focused on documents that are part of the agency's deliberative process and does not address non-deliberative documents that an agency deems appropriate to include in an administrative record. Agencies should continue to follow their existing practices with regard to non-deliberative documents.

The United States' view of the scope of the administrative record is explained at pages 12–19 of the *Price* petition. To summarize, the proper scope of the administrative record in an APA action is "bounded by the proper scope of administrative review." Pet. 13. Absent a "strong showing of bad faith," administrative review is limited to an agency's stated reasons for its decisions, rather than an interrogation of the agency's subjective motives. *Id.* 13–14. But because inquiry into the agency's internal deliberations is immaterial to the purposes of record-review litigation, and would chill free and frank agency deliberation, deliberative documents are not properly considered part of the administrative record. *Id.* at 15. As such, deliberative documents generally should not be produced as part of the administrative record filed with a court, nor listed in a privilege log.

While it may be appropriate in unusual circumstances for an agency to produce deliberative materials as part of an administrative record, any decision to do so should proceed mindful that inclusion of deliberative materials is a deviation from the usual rule and may serve as a harmful precedent in other cases. Agencies should consult with DOJ attorneys to determine whether special reasons for deviating from the usual rule apply in any particular case or jurisdiction. We also suggest that agencies consider reviewing their existing regulations and guidance for consistency with the position expressed herein. Questions regarding this guidance may be directed to the Law and Policy Section of ENRD.

---

United States is more correctly stated in the *Price* petition: Such documents generally should not be regarded as part of the record.



# United States Department of the Interior

OFFICE OF THE SECRETARY  
Washington, DC 20240

DEC 29 2017

## Memorandum

To: Bureau/Office Freedom of Information Act (FOIA) Officers  
FOIA Contacts

From: Cindy Cafaro, Departmental FOIA Officer

Subject: Foreseeable Harm Standard

A handwritten signature in black ink that reads "Cindy Cafaro".

### I. Introduction

This memorandum examines one aspect of the FOIA Improvement Act of 2016—the foreseeable harm standard. While this is an emerging legal area and more guidance may be forthcoming, this guidance provides background and instructions on when to consult with the Office of the Solicitor (SOL) and/or seek additional information from a subject matter expert (SME).

### II. Background

The FOIA<sup>1</sup> generally gives members of the public the right to request Federal agency records and requires agencies to make records that are responsive to these requests promptly available. However, the FOIA has nine exemptions to this general rule of mandatory disclosure.<sup>2</sup> Before the FOIA Improvement Act of 2016 amended the FOIA, some administrations held that if one or more of the nine FOIA exemptions applied to a responsive record (or portion of it), the analysis on whether to withhold the record (in full or in part) was over and the record (or portion of it) should be withheld. Other administrations adopted an additional policy requirement before an agency could withhold a record (or portion of it), requiring the agency to not only identify a FOIA exemption that applied to the record (or portion of it), but also to reasonably foresee that the disclosure of the record (or portion of it) would harm an interest protected by that exemption. This latter requirement, generally known as the *foreseeable harm standard*, was based on a view that even if a record was technically not required to be released (because it was protected from disclosure by a FOIA exemption), it should not be withheld from a requester unless the release would be harmful. The FOIA Improvement Act of 2016 generally adopted the foreseeable harm

<sup>1</sup> 5 U.S.C. § 552.

<sup>2</sup> See the attached Appendix for a general overview of the nine FOIA exemptions.

standard and made it statutory. Therefore, identifying a FOIA exemption that applies to a responsive record (or portion of it) is usually not the end of your analysis.<sup>3</sup>

### **III. Analysis**

#### *A. When Do You Consult with SOL and/or Seek Additional Information from a SME?*

You can withhold a record that is responsive to a FOIA request (or a portion of it) only if a FOIA exemption applies *and* you decide that foreseeable harm would result from the record's release. If you plan to withhold a record in full or in part, you must consult with SOL.<sup>4</sup> Also, seeking additional information from a SME (in other words, reaching out to a SME for relevant facts to inform your decision) is sometimes a best practice (and/or bureau policy) in order to ensure you have full knowledge of the relevant facts needed to make sure your decisions are reasonable.<sup>5</sup> See CHART 1 for further discussion.

If a responsive record cannot be withheld under any of the nine FOIA exemptions, you cannot withhold it and you do not need to consult with SOL or seek additional information from a SME (although you can alert people that the record is going to be released and should consider doing so, especially if the subject of the records relates to a sensitive issue or a matter that is prospectively or currently in litigation).

If a responsive record (or a portion of it) can be withheld under one or more of the nine FOIA exemptions, more consultation and/or information gathering is necessary.

- If you plan to withhold a record (or portion of it) covered by an exemption because you decide foreseeable harm would result from the release of the record, *you must consult with SOL*.
- If you plan to release a record (or portion of it) covered by an exemption because you decide no foreseeable harm would result from the disclosure, *seek additional information from a SME* before taking further steps.
- If you are not sure whether to release or withhold a record (or portion of it) because you don't know if it is covered by an exemption or if foreseeable harm would result, *seek additional information from a SME* before taking further steps.

---

<sup>3</sup> "You," in the context of this memorandum, refers to the Action Office (the office and/or employee that will be making a final decision on a particular FOIA request for the bureau, as described in the Departmental Manual Chapter on FOIA). See [383 DM 15](#) § 15.6.H.

<sup>4</sup> See [43 C.F.R. § 2.23\(c\)](#) (requiring bureaus to consult with SOL before withholding a record in full or in part).

<sup>5</sup> All Department employees are obligated to respond promptly and accurately to FOIA-related requests. See [383 DM 15](#) § 15.6.L. The statutory deadlines for responding to FOIA requests remain in full effect and are not impacted by consultation with SOL and/or seeking additional information from a SME.

| <b>CHART 1</b>                                                                                                                                                                                                                              |                                                   |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>If</b>                                                                                                                                                                                                                                   | <b>Then</b>                                       | <b>And</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| You decide no FOIA exemption applies to any portion of a responsive record                                                                                                                                                                  | You cannot withhold it                            | You do not need to conduct a foreseeable harm analysis, consult with SOL, or seek additional information from a SME (although you can alert people that the record is going to be released)                                                                                                                                                                                                                                                                                                                                                                                                                                |
| You decide an exemption applies to a responsive record (or portion of it) and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)                          | You must consult with SOL                         | You do not need to seek additional information from a SME (unless SOL suggests you do so)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
| You are not sure whether an exemption applies to a responsive record (or portion of it) and/or whether you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it) | You should seek additional information from a SME | <p>After considering the additional information, if you decide an exemption applies and you reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you must consult with SOL</p> <p>After considering the additional information, if you decide an exemption does not apply and/or you do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it), you do not need to consult with SOL (although you can alert people that the record is going to be released)</p> |
| You decide an exemption is applicable to a responsive record (or portion of it) but do not reasonably foresee harm to an interest protected by the exemption would result from the release of the record (or portion of it)                 | You should seek additional information from a SME | You do not need to consult with SOL (unless considering the additional information provided by a SME changes your decision and you plan on withholding the record in full or in part)                                                                                                                                                                                                                                                                                                                                                                                                                                      |

### *B. What Type of Foreseeable Harm Analysis is Needed?*

As discussed above, if you decide a FOIA exemption applies to a responsive record (or portion of it), you must also decide whether it is reasonably foreseeable that harm to an interest protected by the exemption would result from the disclosure. This decision may require varying levels of analysis (see subsections III.B.2 and 3 below) or no analysis (see subsection III.B.1 below).

#### 1. No Foreseeable Harm Analysis Required (Exemptions 1, 3, and 4)

In accordance with the FOIA Improvement Act of 2016, a foreseeable harm analysis is specifically not required for records (or portions of records) that are either: 1) protected by a statute other than the FOIA; or 2) otherwise prohibited from disclosure by law. As a result, a foreseeable harm analysis is generally unnecessary for records covered by Exemption 1, Exemption 3, and Exemption 4.

- Classified records are covered by *Exemption 1*. It is against the law to disclose them to an unauthorized person, so records protected by Exemption 1 are prohibited from disclosure by law and a foreseeable harm analysis is not necessary.
- Records that are protected by a statute other than the FOIA are covered by *Exemption 3*.<sup>6</sup> The amendments in the FOIA Improvement Act of 2016 explicitly note that a foreseeable harm analysis is not necessary for these records.
- Records (or portions of records) that contain trade secrets and confidential or privileged commercial and financial information are covered by *Exemption 4*.<sup>7</sup> If the records (or portions of records) are covered by Exemption 4, they are also protected by the Trade Secrets Act. A determination by an agency that a record (or portion of it) is protected by Exemption 4 thus is generally equivalent to a decision that the record (or portion of the record) is protected by the Trade Secrets Act and is prohibited from disclosure by law.<sup>8</sup> Therefore, a foreseeable harm analysis is not necessary for such a record (or portion of it).

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

---

<sup>6</sup> For example, [these statutes](#) have been found to be covered by Exemption 3.

<sup>7</sup> For more information on Exemption 4, see [Exemption 4 in a Nutshell](#).

<sup>8</sup> This is the case unless a statute or properly promulgated regulation gives the agency authority to release the information covered by Exemption 4, which would remove the disclosure prohibition of the Trade Secrets Act. Consult with SOL if you think this unusual scenario may apply to a particular record otherwise covered by Exemption 4.

## 2. Very Concise Foreseeable Harm Analysis Required (Exemptions 6 and 7)

For records covered by Exemption 6 and Exemption 7, a detailed foreseeable harm analysis is unnecessary. A harm analysis is built into these exemptions because of what they protect: personal privacy (*Exemptions 6 and 7(C)*) and records or information compiled for law enforcement purposes (*Exemption 7*). Disclosure of records covered by these exemptions is not always prohibited by law<sup>9</sup>, however, and they therefore were not specifically excluded from a foreseeable harm analysis in the FOIA Improvement Act of 2016. Articulating a foreseeable harm for records covered by Exemptions 6 and 7 should be quite straightforward.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

## 3. Detailed Foreseeable Harm Analysis Required (Exemptions 2, 5, 8, and 9)

For records covered by Exemption 2, Exemption 5, Exemption 8, and Exemption 9, a detailed foreseeable harm analysis is necessary because a harm analysis is not already built into these exemptions.<sup>10</sup>

*Exemption 2:* protects records that are related solely to the internal personnel rules and practices of an agency (for example, records an agency typically keeps to itself for its own use that only relate to issues of employee relations and human resources). Invoking Exemption 2 and articulating a foreseeable harm for records covered by it will be possible under limited circumstances. For example, the foreseeable harm arising from the release of internal interview questions that are reused for particular vacant positions would be the resulting interference with the proper assessment of the applicants' qualifications.

*Exemption 5:* protects inter-agency or intra-agency materials<sup>11</sup> that would normally be privileged in civil discovery. This exemption incorporates privileges such as the deliberative process privilege (which generally protects records that are predecisional and about a legal or policy matter), the attorney-client privilege (which protects confidential communications between an attorney and her client relating to a legal matter for which the client has sought professional advice), and the attorney work-product privilege (which protects records prepared by an attorney in reasonable contemplation of litigation).

---

<sup>9</sup> It is possible that records covered by Exemption 6 and 7(C) will be protected by the Privacy Act, 5 U.S.C. § 552a, but it will not always be the case. If they are covered by Exemption 6 and/or 7(C) and are prohibited from disclosure by the Privacy Act, no further foreseeable harm analysis will be necessary and you must consult with SOL accordingly.

<sup>10</sup> Since 2009 (when the foreseeable harm test was still a policy, rather than a legal requirement), the FOIA Appeals Office has required Foreseeable Harm Statements for all FOIA appeals that challenge a bureau's/office's decision to withhold records (or portions of records) based on FOIA Exemptions 2, 5, and/or 9.

<sup>11</sup> If this threshold is not met, Exemption 5 cannot protect the record. See *Dep't of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 11-12 (2001).

- The foreseeable harm arising from the release of materials covered by the deliberative process privilege (for example, drafts) may be: injury to the decisionmaking process, a chilling effect on discussion, hasty or uninformed decisionmaking, and public confusion.<sup>12</sup>
- The foreseeable harm arising from the release of materials covered by the attorney-client privilege (for example, confidential emails between an attorney and her client asking for legal advice) may be that the lawyer would no longer be kept fully informed by their client, resulting in unsound legal advice and advocacy.
- The foreseeable harm arising from the release of materials covered by the attorney work-product privilege (for example, attorney notes made in reasonable anticipation of litigation) may be a harm to the adversarial trial process by exposing the attorney's preparation to scrutiny.

When considering whether foreseeable harm would arise from the release of a record protected by one or more of the privileges included in Exemption 5, consider the nature of the decision involved; nature of the decisionmaking process; status of the decision; status of the personnel involved; potential for process impairment; significance of any process impairment; age of the information in the record; and sensitivity of individual record portions. *All of these factors should be balanced against each other; no one factor is determinative.* See CHART 2 for further discussion.

| <b>CHART 2</b>                                                  |                                                                                               |                                                                                                                                                |
|-----------------------------------------------------------------|-----------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Factors to consider when Exemption 5 applies to a record</b> | <b>The factors lead to questions</b>                                                          | <b>And the answers to the questions lead to conclusions</b>                                                                                    |
| Nature of the decision involved                                 | Is it highly sensitive and/or controversial?                                                  | The less sensitive and/or controversial, the less likely foreseeable harm would arise                                                          |
| Nature of the decisionmaking process                            | Does it require total candor and confidentiality?                                             | The less candor and confidentiality required, the less likely foreseeable harm would arise                                                     |
| Status of the decision                                          | Has the decision been made yet?                                                               | If the decision has been made, it is less likely foreseeable harm would arise                                                                  |
| Status of the personnel involved                                | Will the same agency employees, or similarly situated ones, likely be affected by disclosure? | If the same employees, or similarly situated ones, are not likely to be affected by disclosure, it is less likely foreseeable harm would arise |

<sup>12</sup> For example, a requested record might be an inter- or intra-agency draft. The process by which a document evolves from a draft into a final document is inherently deliberative and Exemption 5's deliberative process privilege would generally apply. However, before you can properly withhold a particular draft (or portions of it) under Exemption 5's deliberative process privilege, you must consider whether the release of that particular draft (or portions of it) would harm an interest protected by Exemption 5.

| <b>CHART 2 (CONT.)</b>                                          |                                                                                                             |                                                                                                                                                                                                                           |
|-----------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Factors to consider when Exemption 5 applies to a record</b> | <b>The factors lead to questions</b>                                                                        | <b>And the answers to the questions lead to conclusions</b>                                                                                                                                                               |
| Potential for process impairment                                | Would there be an actual diminishment if employees felt inhibited by potential disclosure?                  | If the process would not be actually impaired or diminished if employees knew disclosure was possible, it is less likely foreseeable harm would arise                                                                     |
| Significance of any process impairment                          | How strong would the chilling effect be?                                                                    | If the chilling effect would be weak, it is less likely foreseeable harm would arise                                                                                                                                      |
| Age of the information in the record                            | Has the sensitivity faded over time? Was the record created more than 25 years before the request was made? | If the sensitivity has faded over time, it is less likely foreseeable harm would arise. If the record was created more than 25 years before the request was made, the deliberative process privilege will no longer apply |
| Sensitivity of individual record portions                       | Can the sensitive materials be segregated from non-sensitive materials?                                     | If the sensitive materials can be non-sensitive materials, it is less likely foreseeable harm would arise from releasing the segregated materials                                                                         |

As a general rule, as illustrated by CHART 2, active deliberative matters are inherently more sensitive than closed matters. Closed matters may nevertheless retain some sensitivities that can be protected from release. The articulation of harm in such closed matters must be particularly clear.

Remember that if you don't reasonably foresee harm resulting from the release (for example, if the draft document you are considering withholding varies from a final, released version in only a few typographical particulars or you are considering withholding decades-old litigation notes from a long-resolved case on a long-repealed statute), the record must be disclosed.

*Exemption 8:* protects information of agencies responsible for the regulation or supervision of financial institutions and is nearly never used by the Department. If you are not sure whether Exemption 8 applies to a responsive record (or portion of it), seek additional information from a SME, as discussed in CHART 1.

*Exemption 9:* protects geological and geophysical information and data, including maps, concerning wells (water wells, natural gas wells, and oil wells all are included). It is possible, though not always the case, that the foreseeable harm arising from the release of information covered by Exemption 9 could be unfair competitive harm arising to oil and gas explorers and extractors from speculators. It is also possible, though also not always the case, that the

foreseeable harm arising from the release of the data would be placing one party at a disadvantage in negotiations over the use of the contents of the well.

When reviewing records to decide whether these exemptions apply, you must carefully review all portions of the records to be sure they fall within the scope of the claimed exemption. You must also reasonably segregate any non-exempt information in order to make a partial disclosure, if possible.

#### **IV. Conclusion**

If you have any questions or need assistance, please contact your Bureau FOIA Officer using the information found at <https://www.doi.gov/foia/contacts> and/or contact me at 202-208-5342 or at [cindy\\_cafaro@ios.doi.gov](mailto:cindy_cafaro@ios.doi.gov).

#### ATTACHMENT

Cc: Timothy Murphy, Assistant Solicitor, Division of General Law, Office of the Solicitor  
Darrell Strayhorn, FOIA and Privacy Act Appeals Officer, Department of the Interior

Appendix to Foreseeable Harm Memorandum: Overview.

| <b>This Exemption</b> | <b>Generally Protects this Type of Information</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | <b>If this Exemption Applies then Conduct</b> |
|-----------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------|
| Exemption 1           | Classified national defense and foreign policy information                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        | No foreseeable harm analysis                  |
| Exemption 2           | Information related solely to the internal personnel rules and practices of an agency                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             | Detailed foreseeable harm analysis            |
| Exemption 3           | Information protected from disclosure by another federal statute                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | No foreseeable harm analysis                  |
| Exemption 4           | Trade secrets and commercial or financial information obtained from a person that is privileged or confidential                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | No foreseeable harm analysis                  |
| Exemption 5           | Inter-agency or intra-agency communications protected by civil discovery privileges (such as the deliberative process privilege, attorney-client privilege, and attorney work-product privilege)                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | Detailed foreseeable harm analysis            |
| Exemption 6           | Information which would constitute a clearly unwarranted invasion of personal privacy if disclosed                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                | Very concise foreseeable harm analysis        |
| Exemption 7           | Information compiled for law enforcement purposes, if disclosure:<br>(A) could reasonably be expected to interfere with enforcement proceedings;<br>(B) would deprive a person of a right to a fair trial or an impartial adjudication;<br>(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy;<br>(D) could reasonably be expected to disclose the identity of a confidential source;<br>(E) would disclose 1) techniques and procedures for law enforcement investigations or prosecutions, or 2) guidelines for law enforcement investigations or prosecutions and that could be reasonably expected to risk circumvention of the law; or<br>(F) could reasonably be expected to endanger the life or physical safety of any individual | Very concise foreseeable harm analysis        |
| Exemption 8           | Information relating to the supervision of financial institutions prepared by or for an agency responsible for such supervision                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   | Detailed foreseeable harm analysis            |
| Exemption 9           | Geological or geophysical information concerning wells                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            | Detailed foreseeable harm analysis            |



Galst, Carey &lt;carey\_galst@fws.gov&gt;

---

## Fwd: Acting AAG Memorandum on Administrative Records

Gilbert, Parks <parks\_gilbert@fws.gov>  
To: Carey Galst <Carey\_Galst@fws.gov>

Tue, Nov 7, 2017 at 7:57 AM

I'm thinking this is actually in place now, b5-ACC & DP

Parks Gilbert  
ESA Litigation Specialist  
Branch of Listing Policy and Support, Ecological Services  
U.S. Fish and Wildlife Service  
5275 Leesburg Pike, MS:ES  
Falls Church, VA 22041  
703/358-1758  
[parks\\_gilbert@fws.gov](mailto:parks_gilbert@fws.gov)

----- Forwarded message -----

From: Chen, Linus <linus.chen@sol.doi.gov>  
Date: Mon, Nov 6, 2017 at 2:38 PM  
Subject: Fwd: Acting AAG Memorandum on Administrative Records  
To: Parks Gilbert <[parks\\_gilbert@fws.gov](mailto:parks_gilbert@fws.gov)>

In case you didn't already get this from someone in DPW:

----- Forwarded message -----

From: Haugrud, Kevin <[jack.haugrud@sol.doi.gov](mailto:jack.haugrud@sol.doi.gov)>  
Date: Wed, Nov 1, 2017 at 4:09 PM  
Subject: Acting AAG Memorandum on Administrative Records  
To: SOL-ANN-ALLEMP <[sol-ann-allemp@sol.doi.gov](mailto:sol-ann-allemp@sol.doi.gov)>, SOL-Immediate Office <[ios@sol.doi.gov](mailto:ios@sol.doi.gov)>

b5-ACC & DP

--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

--

Linus Y. Chen, Attorney

Division Parks & Wildlife

(w) 202-208-5036

(f) 202-208-3877

---

3 attachments

 ENRD Memo - Administrative Record (October 20, 2017).pdf  
219K

 WILDLIFE-#301120-v1-WMRS\_-\_Final\_-Price\_Mandamus\_ Petition\_-\_Opening\_Brief\_(9th\_ Cir\_).PDF  
2685K

 WILDLIFE-#301121-v1-WMRS\_-\_Final\_-Price\_Mandamus\_ Petition\_Reply\_Brief\_(9th\_Cir\_ ).PDF  
190K

**Guidance for Applying Deliberative Process Privilege in Processing Ecological Services FOIA Requests: Coordination with the October 20, 2017, DOJ Memorandum on Administrative Records**

**Purpose of this Document**

To ensure consistent application of the attached Department of Justice Environment and Natural Resources Division's (DOJ) October 20, 2017, administrative record (AR) guidance, this document provides recommendations to Fish and Wildlife Service Ecological Services (FWS) staff for reviewing, redacting, and withholding deliberative information responsive to Freedom of Information Act (FOIA) requests. Specifically, we provide recommendations and considerations for when withholding records as deliberative under FOIA Exemption 5 (5 USC 552(b)(5)) may be appropriate. After identifying documents that should be considered for withholding as deliberative under FOIA Exemption 5, it is incumbent upon FWS personnel engaged in the review process to review all responsive documents, redact them as appropriate, and release any parts of documents that do not qualify for withholding, (i.e., materials that are not deliberative, or would not foreseeably harm the Agency's decision making process if they were released). Where we invoke the deliberative process privilege, FWS must consult with the Department of Interior Solicitor's Office (SOL) to confirm the propriety of invoking FOIA Exemption 5, or other FOIA exemptions.

Note that this document is not intended to be absolute in directing FWS personnel on how to treat all predecisional information in responding to a FOIA request (i.e., it is not suggesting that FWS automatically withhold all such information), nor to replace an appropriate foreseeable harm analysis. Rather, this document is intended to raise awareness of the need to process FOIA requests in a manner most likely to preserve the consistency of information released under FOIA with information that could be subsequently included in an AR pursuant to Administrative Procedure Act (APA) litigation involving FWS decisions. While this document will be most useful for Endangered Species Act (ESA) matters, it also applies to FOIAs relating to other laws that are administered by FWS, such as the National Environmental Policy Act, Coastal Barrier Resources Act, Federal Power Act, Bald & Golden Eagle Protection Act, etc., but ESA is the primary focus.

**Background**

The October 20, 2017, DOJ memorandum clarifies that an AR associated with litigation on an agency decision under the APA should not include deliberative documents. Specifically, the memorandum explains that, "documents reflecting the agency's predecisional deliberative process – generally are not relevant to APA review, and including them in the administrative record would inhibit agency decision-making." Courts generally review FWS's decisions under APA standards.

Implementing this policy will require a change in the way the FWS compiles ARs for court cases. Previously, it was common practice for the FWS to include deliberative documents in its ARs, even though the agency could have asserted they were deliberative process-privileged, and ARs tended to be voluminous. However, some ARs that have been prepared for programmatic rules or policies and for national consultations have generally not included deliberative documents. For example, ARs on the:

- Policy on Significant Portion of Its Range did not include many substantive emails exchanged during the development of the draft and final policies, nor did it include some drafts of the policy, intra- and inter-agency comments on the policies, and certainly attorney-client privileged materials.
- Section 7 consultation on EPA's Clean Water Act 316(b) rule, which regulates how cooling water intake structures at plants are to operate to avoid harming listed species, we withheld and listed in a privilege log draft biological opinions and reasonable and prudent alternatives, emails containing inter- and intra-agency comments on the drafts, and briefing papers.

Recently (late 2017-early 2018), DOJ has also required that we prepare more limited ARs for non-programmatic ESA cases, such as in the litigation over the GYE grizzly delisting, the Keystone XL pipeline consultation litigation, golden-cheeked warbler petition finding, coastal California gnatcatcher petition finding, Atlantic Coast Pipeline consultation, and the California WaterFix consultation.

DOJ's AR direction has an indirect impact on our FOIA program as well. Interested stakeholders often send FOIA requests for information regarding FWS's ESA decisions in advance of litigation. In past FOIA responses, FWS has often released most, if not all, documents related to its ESA final decisions without undertaking a discerning review for deliberative materials. DOJ's direction on compiling ARs reinforces that we should take great care with our FOIA responses relating to ESA decisions. While it is important to be transparent about agency decisionmaking, we also have an obligation to consider the applicability of FOIA exemptions to decisions and to protect deliberations relating to those decisions when analysis allows us to reasonably foresee harm from releasing related documents and information.

### **Deliberative Process Privilege under FOIA Exemption 5 and Foreseeable Harm**

The deliberative process privilege, with some caveats, allows a federal agency to withhold information from public disclosure if it has not been shared outside the federal government, it is predecisional, and it is deliberative. Predecisional means it predated the decision in question, while deliberative means the document expresses recommendations on legal or policy matters. Further, in addition to a determination that the material qualifies as deliberative, we must reasonably foresee that harm would result from release of the information in order to withhold it. The DOI FOIA Appeals Office requires us to articulate the harm we reasonably foresee from the

release of a document subject to an exemption under FOIA. The office responding to the FOIA request must conduct a foreseeable harm analysis on a case-by-case basis, typically consisting of written documentation stating how many documents were withheld and why, as well as describing the foreseeable harm anticipated if they were released.

In the attached December 29, 2017, memorandum from the Department of the Interior’s Departmental FOIA Officer, addressing the “Foreseeable Harm Standard,” (DOI FOIA Memo) the foreseeable harm arising from the release of materials covered by the deliberative process privilege may include, “...injury to the decisionmaking process, a chilling effect on discussions, hasty or uninformed decisionmaking, and public confusion.” The DOI FOIA Memo includes a chart (pp. 6-7) that provides more information on how to complete a foreseeable harm analysis. For example, the release of notes from a recommendation team meeting on the classification status of a species under the ESA that identified the views of individuals could place those individuals in a negative public light or otherwise subject them to public scrutiny. That in turn could cause a chilling effect on frank conversations amongst staff and/or decisionmakers which would harm the decisionmaking process. While releasing recommendation meeting notes may not cause foreseeable harm, they (along with other documents listed later in this memo) should be carefully reviewed.

If the lead office on a FOIA determines that it should invoke the privilege and withhold documents, it needs to ensure that it has the authority to make calls on withholding and must also consult with SOL on the proposed withholding. It often makes sense not only to work with the SOL attorney assigned to review the withholding, but if a different attorney participated in or reviewed the underlying decision, to consult with that attorney, too, to receive input on withholding determinations.

### **Additional FOIA Exemption 5 Privileges**

In addition to the deliberative process privilege, FOIA Exemption 5 includes two other privileges that FWS has traditionally considered: attorney-client communications and attorney work-product. As set out in the DOI FOIA Memo, the foreseeable harm arising from the release of materials covered by the attorney-client privilege may be that, “...the lawyer would no longer be kept fully informed by their [sic] client, resulting in unsound legal advice and advocacy.” Further, the foreseeable harm arising from releasing attorney work product may include, “...harm to the adversarial trial process by exposing the attorney’s preparation to scrutiny.” Although the DOJ Memo on ARs focused on the deliberative process privilege under Exemption 5, these two additional privileges under that exemption should be carefully considered in processing FOIA requests on FWS decisions subject to APA review. In particular, documents should be reviewed for attorney involvement or communications, including references to and repeating of attorneys’ advice in emails. For further information about these additional Exemption 5 privileges and their application, please consult the DOI FOIA Memo and your office’s FOIA specialist.

## **General Application of the Deliberative Process Privilege to FWS's FOIA Responses**

The need for careful review in our FOIA responses arises as follows:

- As to protecting our decisions in the FOIA context: release of deliberative information could lead to the harms described above, and so we must carefully consider whether foreseeable harm could result from releasing the information.
- As to protecting our decisions in APA litigation:
  - If the FWS fails to withhold appropriately-categorized deliberative information in making a release under FOIA in these instances, the deliberative process privilege over those documents arguably has been waived by the Department.
  - If a citizen subsequently sues the FWS over its decision in the same matter, but FWS does not include deliberative information when compiling the AR in accordance with DOJ policy, the plaintiff could petition the court to order the FWS to supplement the AR with those deliberative documents that were released under the previous FOIA request.
  - Such inadvertent release or failure to include those documents in the AR could also give the court reason to grant discovery beyond the AR, which is burdensome.

While DOJ has acknowledged that they anticipate some record challenges related to the new AR direction, they stated that they are prepared to defend those challenges. Further, there is no expectation that FOIA responses and ARs will be completely consistent, as the standards are different: FOIA's are whether the information is deliberative and foreseeable harm would result; ARs are about the information not being relevant to a court's APA review. Nevertheless, successful defense of our ARs is partially dependent on thoughtful application of Exemption 5 in our FOIA responses.

To prevent such issues from arising, in responses to FOIAs, FWS personnel should carefully review responsive documents for deliberative process privilege applicability. If deliberative process privilege could apply, they must then evaluate whether disclosure of any identified deliberative documents could cause the FWS foreseeable harm (defined in the December 29, 2017, DOI FOIA Memo described above). If we do not reasonably foresee harm in release and no other exemptions apply, the document must be released. In other words, the guidance is not to simply withhold all deliberative information from a FOIA response. Further, there may be individual instances in litigation when the DOJ trial attorney and SOL attorney assigned to the matter advise that we include particular deliberative documents in the AR to make sure that our decision is adequately explained, as per direction from the acting solicitor that followed DOJ's AR direction.

## **Applying the Deliberative Process Privilege to Specific File Types Relevant to FWS Decisionmaking**

During the review of documents where the deliberative process privilege may apply, the following should be considered during thorough document review. This review is typically conducted by the subject matter expert(s) and/or agency FOIA staff and reviewed by the FWS FOIA Officer or Regional FOIA Coordinator and SOL if documents are to be withheld.

- Categories of information and documents that should be considered for withholding in full or in part under Exemption 5's deliberative process privilege, if foreseeable harm could result from release, and a segregability analysis has been undertaken (determining whether certain portions of an otherwise privileged document can be released):
  - Draft outlines, conceptual treatments, etc.;
  - Draft inserts of language for team consideration or inclusion in policy/rule;
  - Draft versions of policies and rules (noting that some versions do not differ substantively from the public versions, or can otherwise be released)
  - Draft responses to public comments, often found within edited spreadsheets produced by regulations.gov, or other systems that sort comments into groupings of substantive vs. non-substantive;
  - Internal comments from other Service offices and regions;
  - Email content that reflects substantive suggestions and interpretations that were never adopted, or tentative analysis and discussion of options;
  - PowerPoints/webinars not shared with audiences external to the federal government;
  - Internal summaries, analyses, and comparative materials (only if a review determines that they are predecisional);
  - Email discussions about who needs to be briefed and the scheduling of such briefings, paying specific attention to any deliberative content;
  - Internal briefing documents that address pre-decisional substantive issues;
  - Decision meeting notes and summaries, score sheets, and memos to file reflecting substantive deliberation and especially participant names, position, or individual decision recommendations.
- Categories of information and documents that are typically released in full:
  - Regulations.gov materials, downloaded directly from regulations.gov (public comments and website generated spreadsheets of public comments and their attachments);
  - Meeting materials, such as agendas (but all substantive information will be considered for redaction);
  - Team email discussions and materials that address meeting agendas, timelines and tasks/assignments so long as they do not discuss specific positions on those topics.

- Transmittal emails that mention that comments are attached but do not reveal the substance of the comments. They will be released even if they mention the topic or the pages where comments are found so long as they do not reveal specific positions/comments (this typically only applies to interagency comments on draft rules coordinated by OMB);
  - Subject lines and attachment names, unless they reveal content that reflects substantive information;
  - Portions of internal agency emails that contain non-substantive communications such as general housekeeping information, transmitting attachments that are OK to release, exchanging pleasantries, and other types of similar non-substantive content;
  - PowerPoints/webinars that have been shared with non-federal audiences;
  - Internal briefing documents that address only procedural issues, such as whether to extend the comment period (though we would redact any attorney-client material);
  - Decision memoranda that reflect the final decision and rationale of the agency; and
  - Final memoranda communicated to OMB Directors.
- Categories of information and documents that may be considered for withholding in part under other exemptions that FWS offices commonly use:
    - Conference lines/passcodes (Exemption 5 as protected under the Commercial Information Privilege);
    - Personal Information - such as personal cell phone numbers, personal email accounts not used to conduct business, or detailed references to medical status or personal life (Exemption 6, Personal Privacy); and
    - Trade secrets and confidential business information, such as proprietary GIS data (Exemption 4)

### **Consultation/Referral Process for Other Agencies**

Consistent with past practice, information originating with or of interest to other bureaus and agencies will require referral to or consultation with that other agency prior to making a final determination on the disposition of that document. This includes, but is not limited to, information such as emails and comments from other agencies, such as CEQ, DOJ, OMB, EPA, etc., as well as documents on their letterhead. Consult with the FWS FOIA Officer or your Regional FOIA Coordinator if the records you have located contain information that originated with another agency. All consultations and referrals must be reviewed and approved by the FWS FOIA Officer.

**For Further Information**

If you have questions or concerns regarding this guidance, please contact the Branch of Listing Policy and Support in Headquarters (Carey Galst, Parks Gilbert, and Eileen Harke), who will coordinate as appropriate with the FWS FOIA Officer and DOI FOIA SOL. If you have questions about specific FOIA matters, please direct them to your office's FOIA specialist or to the SOL attorney assigned to the FOIA matter.

**From:** [Galst, Carey](#)  
**To:** [Kravitz, Christina](#)  
**Cc:** [Carey Gilbert; Eileen Harke](#)  
**Subject:** Re: Skinny Administrative Record/FOIA Guidance  
**Date:** Monday, September 10, 2018 7:19:56 AM

---

Thanks, Christina - maybe we can do it at a practitioners mtg on Wed one of these months coming up.

><> ><> ><> ><> ><> ><> ><> ><> ><>

**Carey Galst-Cavalcante**

Chief, Branch of Listing Policy and Support, Ecological Services  
U.S. Fish and Wildlife Service Headquarters  
5275 Leesburg Pike MS: ES, Falls Church, VA 22041-3803  
phone: 703-358-1954; fax: 703-358-1735  
email: [carey\\_galst@fws.gov](mailto:carey_galst@fws.gov)

On Fri, Sep 7, 2018 at 1:58 PM, Kravitz, Christina <[christina\\_kravitz@fws.gov](mailto:christina_kravitz@fws.gov)> wrote:  
Hi Carey,

Thanks for the information!

I would be interested in a webinar at some point to explain how FOIA is done in HQ (Bridget mentioned a possibility of a webinar in her email that you forwarded). Please keep me/ES HQ updated on any webinar that does get scheduled. Hopefully, I will be able to attend remotely **b6-Personal Privacy**

Thanks!

-Christina

\*\*\*\*\*  
\*\*\*\*\*

Christina D. Kravitz  
National NRDAR Coordinator  
U.S. Fish & Wildlife Service  
MS: ES  
[5275 Leesburg Pike](#)  
[Falls Church, VA 22041](#)-3803  
(703) 358-1782 (w)  
(703) 626-7485 (c)

**Note:** I am in the office Wed afternoons and Thr mornings; otherwise I work from home. When at home, you can call my cell directly at (703) 626-7485 during business hours. (I do try to forward my work phone to my cell, too).

[christina\\_kravitz@fws.gov](mailto:christina_kravitz@fws.gov)

\*\*\*\*\*  
On Thu, Sep 6, 2018 at 1:33 PM, Galst, Carey <[carey\\_galst@fws.gov](mailto:carey_galst@fws.gov)> wrote:

Hi All -

Please see the attached AR and FOIA guidance. Please let us know if you have any questions.

Thanks!

Carey

><> ><> ><> ><> ><> ><> ><> ><> ><>

**Carey Galst-Cavalcante**

Chief, Branch of Listing Policy and Support, Ecological Services

U.S. Fish and Wildlife Service Headquarters

[5275 Leesburg Pike](#) MS: ES, Falls Church, VA 22041-3803

phone: 703-358-1954; fax: 703-358-1735

email: [Carey\\_Galst@fws.gov](mailto:Carey_Galst@fws.gov)

----- Forwarded message -----

From: Fahey, Bridget <[bridget\\_fahey@fws.gov](mailto:bridget_fahey@fws.gov)>

Date: Thu, Sep 6, 2018 at 12:37 PM

Subject: Skinny Administrative Record/FOIA Guidance

To: FWS ES Regional ARDs <[fws\\_es\\_regional\\_aruds@fws.gov](mailto:fws_es_regional_aruds@fws.gov)>, FWS ES Deputy ARDs <[fws\\_es\\_deputy\\_aruds@fws.gov](mailto:fws_es_deputy_aruds@fws.gov)>, Susan Jacobsen <[Susan\\_Jacobsen@fws.gov](mailto:Susan_Jacobsen@fws.gov)>, Alisa Shull <[alisa\\_shull@fws.gov](mailto:alisa_shull@fws.gov)>, Sarah Quamme <[Sarah\\_Quamme@fws.gov](mailto:Sarah_Quamme@fws.gov)>, Aaron Valenta <[Aaron\\_Valenta@fws.gov](mailto:Aaron_Valenta@fws.gov)>, Don Morgan <[Don\\_Morgan@fws.gov](mailto:Don_Morgan@fws.gov)>, Gina Shultz <[Gina\\_Shultz@fws.gov](mailto:Gina_Shultz@fws.gov)>, Drew Crane <[drew\\_crane@fws.gov](mailto:drew_crane@fws.gov)>, Jeff Newman <[jeff\\_newman@fws.gov](mailto:jeff_newman@fws.gov)>, Marilet Zablan <[marilet\\_zablan@fws.gov](mailto:marilet_zablan@fws.gov)>, Marjorie Nelson <[marjorie\\_nelson@fws.gov](mailto:marjorie_nelson@fws.gov)>, Martin Miller <[martin\\_miller@fws.gov](mailto:martin_miller@fws.gov)>, "Long, Michael" <[michael\\_long@fws.gov](mailto:michael_long@fws.gov)>, "Merritt, Timothy" <[timothy\\_merritt@fws.gov](mailto:timothy_merritt@fws.gov)>, "Aubrey, Craig" <[craig\\_aubrey@fws.gov](mailto:craig_aubrey@fws.gov)>, "Frazer, Gary" <[gary\\_frazer@fws.gov](mailto:gary_frazer@fws.gov)>

Cc: Parks Gilbert <[parks\\_gilbert@fws.gov](mailto:parks_gilbert@fws.gov)>, Eileen Harke <[eileen\\_harke@fws.gov](mailto:eileen_harke@fws.gov)>, Carey Galst <[Carey\\_Galst@fws.gov](mailto:Carey_Galst@fws.gov)>

Hello folks. I am transmitting guidance on applying the deliberative process privilege in our FOIA responses, as well as some related documents. In light of the administrative records direction from the Department of Justice last fall, we decided it was necessary to provide additional guidance on how to respond to FOIA responses so that we are not releasing information in FOIA that would undermine our positions taken in litigation via the administrative records. The attached guidance had input from regional staff, our solicitors, and the FWS FOIA Officer. We also discussed it on an ES Chiefs call earlier this year. We would like you to please begin following the guidance as of today.

If you have questions, please contact Carey Galst, Parks Gilbert, or Eileen Harke in the Branch of Listing Policy and Support. We are also considering offering a webinar later this year to explain how we approach FOIAs in HQ -- let us know if you are interested in such a webinar.

Thank you!

**Bridget Fahey**  
**Division Chief for Conservation and Classification**  
**U.S. Fish and Wildlife Service**  
**(703) 358-2163**

**From:** [Galst, Carey](#)  
**To:** [Fahey, Bridget](#)  
**Cc:** [Don Morgan](#); [Sarah Quamme](#)  
**Subject:** Re: Call for Agenda Items for ARD call 09/20/18  
**Date:** Monday, September 17, 2018 8:17:14 AM

I am sure people will want to know about b5-DPP

We could also make people aware about the skinny AR/FOIA guidance being finalized and remind people about the need to look closely at what is being released under FOIA. b5-DP

><> ><> ><> ><> ><> ><> ><> ><> ><> ><>

**Carey Galst-Cavalcante**

Chief, Branch of Listing Policy and Support, Ecological Services  
U.S. Fish and Wildlife Service Headquarters  
5275 Leesburg Pike MS: ES, Falls Church, VA 22041-3803  
phone: 703-358-1954; fax: 703-358-1735  
email: [Carey\\_Galst@fws.gov](mailto:Carey_Galst@fws.gov)

On Mon, Sep 17, 2018 at 8:11 AM, Fahey, Bridget <[bridget\\_fahey@fws.gov](mailto:bridget_fahey@fws.gov)> wrote:

Any items we should be bringing up on the ARD call? SPR?

----- Forwarded message -----

From: **Wellman, Lois** <[lois\\_wellman@fws.gov](mailto:lois_wellman@fws.gov)>  
Date: Mon, Sep 17, 2018 at 8:06 AM  
Subject: Call for Agenda Items for ARD call 09/20/18  
To: FWS ES Deputy ARDs <[fws\\_es\\_deputy\\_aruds@fws.gov](mailto:fws_es_deputy_aruds@fws.gov)>, FWS ES Regional ARDs <[fws\\_esRegional\\_aruds@fws.gov](mailto:fws_esRegional_aruds@fws.gov)>, Gary Frazer <[gary\\_frazer@fws.gov](mailto:gary_frazer@fws.gov)>, Jeff Newman <[jeff\\_newman@fws.gov](mailto:jeff_newman@fws.gov)>, Bridget Fahey <[Bridget\\_Fahey@fws.gov](mailto:Bridget_Fahey@fws.gov)>, Martha BalisLarsen <[Martha\\_BalisLarsen@fws.gov](mailto:Martha_BalisLarsen@fws.gov)>, Ashley Stilson <[ashley\\_stilson@fws.gov](mailto:ashley_stilson@fws.gov)>, Craig Aubrey <[craig\\_aubrey@fws.gov](mailto:craig_aubrey@fws.gov)>

Please send agenda items to me by noon, Wednesday, September 20 for the ARD call on 09/20/18.

Thanks,

Lois

--

Lois Wellman  
AES Special Assistant

Office of the Assistant Director for Ecological Services  
U.S. Fish & Wildlife Service  
**1849 C St. NW**

MIB 3345  
Washington, DC 20240  
[Lois\\_Wellman@fws.gov](mailto:Lois_Wellman@fws.gov)  
(202)208-4646 office  
(202)208-5618 fax

**From:** [Wellman, Lois](#)  
**To:** [Gary Frazer](#); [FWS ES Deputy ARDs](#); [FWS ES Regional ARDs](#); [Bridget Fahey](#); [Martha BalisLarsen](#); [Ashley Stilson](#); [Craig Aubrey](#); [Jeff Newman](#); [Shultz, Gina](#)  
**Bcc:** [Carey\\_Galst@fws.gov](#)  
**Subject:** Agenda for 9/20/18 ARD Call  
**Date:** Thursday, September 20, 2018 10:37:47 AM  
**Attachments:** [Proposed ARD Meeting Dates.docx](#)  
  [ES ARD Monthly Call Agenda 092018.doc](#)

---

Please find attached the ARD agenda. If you have any questions, please let me know.

Thanks,

Lois

--  
Lois Wellman  
AES Special Assistant  
Office of the Assistant Director for Ecological Services  
U.S. Fish & Wildlife Service  
1849 C St. NW  
MIB 3345  
Washington, DC 20240  
[Lois\\_Wellman@fws.gov](mailto:Lois_Wellman@fws.gov)  
(202)208-4646 office  
(202)208-5618 fax

## Proposed ARD Meeting Dates

R2 - April 8 - 12, 2019

R3 - October 21-25, 2019

R4 - April 13 - 17, 2020

R5 - October – 19 - 23, 2020

R6 - April - 19 - 23, 2021

R7 – August - 16-20, 2021

R8 - April - 4 - 8, 2022

HQ - October - 24-28, 2022

# **Ecological Services Assistant Regional Director Monthly Call**

**Thursday, September 20 from 2:00-3:00 p.m. EST**

## **Agenda**

Phone Number: **b5-CIP**

Passcode: **b5-CIP**

- I.      Opening Remarks – Gary
- II.     IPaC Update - Craig
- III.    b5-DP [REDACTED]
- [REDACTED] [REDACTED]
- V.      Skinny AR/FOIA guidance update - Bridget
- VI.     End of year reviews update – Bridget
- VII.    December ARD Meeting – Lori
- VIII.   Future Dates for ARD meetings – See attachment
- IX.     Regional Updates – All